Petition

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CITY OF LAFAYETTE,

Petitioner,

v.

JAMES E. HERNANDEZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI

CHARLES L. SIEMON
WENDY U. LARSEN
ROSS, HARDIES, O'KEEFE, BABCOCK & PARSONS
One IBM Plaza, Suite 3100
Chicago, Illinois 60611
(312) 467-9300
Counsel for Petitioner

Of Counsel
RICHARD F. BABCOCK
SUSAN LICHTENFELD
BARBARA ROSS

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QUESTIONS PRESENTED

1. Do the Fifth and Fourteenth Amendments to the United States Constitution provide for just compensation as a remedy when a police power regulation is adjudicated to deprive a landowner of all beneficial use of his property?

2. If a regulation which prohibits all beneficial use of property constitutes a taking for public use for which just compensation must be paid, does the period of taking commence:

a) when the regulation was first enacted;

b) within a reasonable time after a landowner formally requests that the regulation be changed; or

c) when a court of competent jurisdiction determines that the regulation effects a taking?

3. Does a municipality have an absolute legislative immunity from suit for money damages under 42 U. S. C. § 1983 when it acts in its legislative capacity?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
BASIS FOR FEDERAL JURISDICTION IN THE COURT BELOW	4
REASONS FOR GRANTING THE WRIT	5
A. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE MUNICIPAL LIABILITY FOR MONEY DAMAGES FOR REGULATORY ACTIONS IS AN ISSUE OF GREAT IMPORTANCE LEFT UNDECIDED BY PRIOR DECISIONS OF THIS COURT	5
B. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT'S "TAKING" ANALYSIS CONFLICTS WITH A PROPER READING OF THIS COURT'S OPINION IN *PENNSYLVANIA COAL* V. *MAHON*	7
C. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT'S OPINION CONFLICTS WITH THAT OF ANOTHER CIRCUIT AND THE OPINIONS OF MANY STATE COURTS AS TO THE PROPER REMEDY FOR A "TAKING" AND IS NOT SUPPORTED BY DECISIONS OF THIS COURT	14

PAGE

D. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE OPINION OF THE FIFTH CIRCUIT CONFLICTS WITH THE OPINIONS OF THIS COURT ON THE AVAILABILITY OF LEGISLATIVE IMMUNITY 19

CONCLUSION 27

APPENDICES

TABLE OF AUTHORITIES

Cases

	PAGE
Agins v. *City of Tiburon*, 447 U. S. 255 (1980)	7, 15, 18
Agins v. *City of Tiburon*, 24 Cal. 3d 266, 598 P. 2d 25, 157 Cal. Rptr. 372 (1979), aff'd, 447 U. S. 255 (1980)	14
Andrus v. *Allard*, 444 U. S. 51 (1979)	16
Askew v. *Gables-By-The-Sea, Inc.*, 333 So. 2d 56 (Fla. Dist. Ct. App. 1976), *cert. denied*, 345 So. 2d 420 (Fla. 1977)	18
Bauman v. *Ross*, 167 U. S. 548 (1897)	12
Bernard v. *State Dept. of Public Works*, 127 So. 2d 774 (La. App. 1961)	22
Bill Posting Sign Co. v. *Atlantic City*, 71 N. J. L. 72, 58 A. 342 (1904)	12
Bishop & Parsons v. *Mayor*, 7 Ga. 200 (1849)	22
Block v. *Hirsch*, 256 U. S. 135 (1921)	11
Brinkmeyer v. *City of Evansville*, 29 Ind. 187 (1867)	23
Bruce v. *Riddle*, 631 F. 2d 272 (4th Cir. 1980)	6
City of Newport v. *Fact Concerts, Inc.*, ____ U. S. ____, 49 U. S. L. W. 4860 (June 26, 1981)	20, 23
City of Oklahoma City v. *Hill*, 6 Okla. 114, 50 P. 242 (1897)	23
City of St. Louis v. *Dreisoerner*, 243 Mo. 217, 147 S. W. 998 (1912)	12
Clark v. *Los Angeles*, 650 F. 2d 1033 (9th Cir. 1981)	6
Columbia Gulf Transmission Co. v. *Hoyt*, 252 La. 921, 215 So. 2d 114 (1968)	22
Conway v. *Housing Authority*, 266 Ark. 404, 584 S. W. 2d 10 (1979)	18
Couf v. *DeBlaker*, 652 F. 2d 585 (5th Cir. 1981)	6
Davis v. *Pima County*, 121 Ariz. 343, 590 P. 2d 459 (1978), *cert. denied*, 442 U. S. 942 (1979)	15

PAGE

Dewey v. *City of Detroit*, 15 Mich. 307 (1867) 23
Eck v. *City of Bismark*, 283 N. W. 2d 193 (N. D. 1979) 15
Entertainment Concepts, Inc., III v. *Maciejewski*, 631 F. 2d 497 (7th Cir. 1980), *cert. denied* sub nom., *Maciejewski* v. *Entertainment Concepts, Inc., III.*, ____ U. S. ____, 101 S. Ct. 1366 (1981) 6
Fowle v. *Common Council of Alexandria*, 28 U. S. (3 Pet.) 398 (1830) 21
Fred F. French Investing v. *City of New York*, 39 N. Y. 2d 587, 350 N. E. 2d 381, 385 N. Y. S. 2d 5 (1975), appeal dismissed, 429 U. S. 990 (1976) 10
Gary D. Reihart, Inc. v. *Township of Carroll*, 487 Pa. 461, 409 A. 2d 1167 (1979) 15
Gold Run, Ltd. v. *Board of County Commissioners*, 38 Colo. App. 44, 554 P. 2d 317 (1976) 15
Gorman Towers, Inc. v. *Bogoslavsky*, 626 F. 2d 607 (8th Cir. 1980) 6
Griffin v. *Mayor & Council of New York*, 9 N. Y. 456 (Ct. App. 1853) 21
Hartman v. *Tresise*, 36 Colo. 146, 84 P. 685 (1905) 12
Heller v. *Village of South Orange*, 3 N. J. Misc. 1076, 130 A. 534 (1925) 13
Hernandez v. *City of Lafayette*, 643 F. 2d 1188, rehearing denied, 649 F. 2d 336 (5th Cir. 1981). 22
Hernandez v. *City of Lafayette*, 399 So. 2d 1179 (La. App.), *writ denied*, ____ So. 2d ____, (La. 1981) 6
Holaway v. *City of Pipestone*, 269 N. W. 2d 28 (Minn. 1978) 15
Hudson County Water Co. v. *McCarter*, 209 U. S. 349 (1908) 12

PAGE

In re Kansas City Ordinance No. 39946, 298 Mo. 569, 252 S. W. 404 (1923) 13
Jacobson v. *Tahoe Regional Planning Agency*, 474 F. Supp. 901 (D. Nev. 1979) 15, 18
Johnson v. *City of Charleston*, 91 W. Va. 318, 112 S. E. 577 (1922) 13
Kaiser Aetna v. *United States*, 444 U. S. 164 (1979) 16, 26
Kelley v. *City of Milwaukee*, 18 Wis. 83 (1864) 21
Lochner v. *New York*, 198 U. S. 45 (1905) 13
Maher v. *City of New Orleans*, 516 F. 2d 1051 (5th Cir. 1975), *cert. denied*, 426 U. S. 905 (1976) 16
Mailman Development Corp. v. *City of Hollywood*, 286 So. 2d 614 (Fla. Dist. Ct. App. 1973), *cert. denied*, 293 So. 2d 717 (Fla.), *cert. denied* 419 U. S. 844 (1974) 14
Marbury v. *Madison*, 5 U. S. (1 Cranch) 137 (1803) 17
Martin v. *District of Columbia*, 205 U. S. 135 (1907) 11
Metromedia Inc. v. *City of San Diego*, ____ U. S. ____, 49 U. S. L. W. 4925 (July 2, 1981) 5, 26
Monell v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978) 6
M. Wineburgh Advertising Co. v. *Murphy*, 129 A. D. 260, 113 N. Y. S. 855 (App. Div. 1908), *aff'd* 195 N. Y. 126, 88 N. E. 17 (1909) 12
Northern Transportation Co. of Ohio v. *City of Chicago*, 99 U. S. 635 (1879) 21
Ogg v. *The City of Lansing*, 35 Iowa 495 (1872) 23
Owen v. *City of Independence*, 445 U. S. 622 (1980) ..... *passim*
Pamel Corp. v. *Puerto Rico Highway Authority*, 621 F. 2d 33 (1st Cir. 1980) 14
Penn Central Transp. Co. v. *New York City*, 438 U. S. 114 (1978) 9, 15, 26

PAGE

Pennsylvania Coal Co. v. *Mahon*, 260 U. S. 393 (1922) ..... *passim*
Piper v. *Ekern*, 180 Wis. 586, 194 N. W. 159 (1923) 13
Pope v. *City of Atlanta*, 242 Ga. 331, 249 S. E. 2d 16 (1978), *cert. denied*, 440 U. S. 936 (1979) 15
Prune Yard Shopping Center v. *Robins*, 447 U. S. 74 (1980) 16
Riley v. *Town of Greenwood*, 72 S. C. 90, 51 S. E. 532 (1905) 12
Romar Realty Co. v. *Board of Commissioners of Haddonfield*, 96 N. J. L. 117, 114 A. 248 (1921). 12
San Diego Gas & Electric v. *City of San Diego*, ____ U. S. ____, 101 S. Ct. 1287 (1981) ..... *passim*
Schad v. *Borough of Mount Ephraim*, ____ U. S. ____, 101 S. Ct. 2176 (1981) 25
Smoot v. *Mayor, etc., of Wetumpka*, 24 Ala. 112 (1854) 23
Standard Bill Posting Co. v. *Hastings*, 77 Misc. Rep. 453, 137 N. Y. S. 186 (Sup. Ct. 1912), aff'd. 153 A. D. 920, 138 N. Y. S. 1137, aff'd. 207 N. Y. 763, 101 N. E. 1118 (1913) 12
State v. *Hillman*, 110 Conn. 92, 147 A. 294 (1929) 13
State v. *Robb*, 100 Me. 180, 60 A. 874 (1905) 12
Stockdale v. *Rio Grande Western Ry. Co.*, 28 Utah 201, 77 P. 849 (1904) 12
Sumner v. *Philadelphia*, 23 F. Case 392 (C. C. E. D. Pa. 1873) (No. 13,611) 22
Supreme Court of Virginia v. *Consumers Union*, 446 U. S. 719 (1980) 19, 20
Tenney v. *Brandhove*, 341 U. S. 367 (1951) 20
Trustees Under Will of Pomeroy v. *Town of Westlake*, 357 So. 2d 1299 (La. App.), *cert. denied*, 359 So. 2d 205 (La. 1978) 16, 22
United States v. *Russell*, 80 U. S. (13 Wall.) 623 (1871) 22

PAGE

Village of Belle Terre v. *Boraas*, 416 U. S. 1 (1974) 25

Visidor Corporation v. *Borough of Cliffside Park*, 48 N. J. 214, 225 A. 2d 105 (1966), *cert. denied* 386 U. S. 972 (1967) 15

Vreeland v. *Forest Park Reservation Commission*, 82 N. J. Eq. 349, 87 A. 435 (1913) 12

Ware v. *City of Wichita*, 113 Kan. 153, 214 P. 99 (1923) 13

Weightman v. *The Corporation of Washington*, 66 U. S. (1 Black) 39 (1862) 21

Western College of Homeopathic Medicine v. *City of Cleveland*, 12 Ohio St. 375 (1861) 23

Wheeler v. *City of Cincinnati*, 19 Ohio St. 19 (1869) 23

Constitutional Provisions and Statutes

Fifth Amendment to the United States Constitution ..... *passim*

Fourteenth Amendment to the United States Constitution 2, 4, 14

28 U. S. C. § 1331 4

28 U. S. C. § 1343 4

42 U. S. C. § 1983 ..... 3, 4, 5, 6

42 U. S. C. § 1985 ..... 3, 4

42 U. S. C. § 1988 24

PAGE

Other Authorities

R. Babcock, THE ZONING GAME (1966) 26
F. Bosselman, D. Callies, J. Banta, THE TAKING ISSUE (1973) 8, 12
G. Field, THE LAW OF DAMAGES (1876) 23
F. Frankfurter, *Twenty Years of Mr. Justice Holmes' Constitutional Opinions,* 8 HARV. L. REV. 910 (1923) 27
D. Hagman, *Temporary or Interim Damages Awards in Land Use Control Cases* (pts. 1 and 2) 6 ZONING & PLAN. L. REPORT 129 (1981) 6
D. Mandelker, *Land Use Takings: The Compensation Issue,* 8 HASTINGS CONST. L. Q. 491 (1981) 19
E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS (3rd ed. 1971) 23
A. Rathkopf, THE LAW OF ZONING AND PLANNING (4th ed. 1981) 19

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CITY OF LAFAYETTE,

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PETITION FOR WRIT OF CERTIORARI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, the City of Lafayette,[1] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 1, 1981, as amended by its opinion of June 30, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 643 F. 2d 1188. The opinion of the Court of

[1] The former Mayor of the City of Lafayette, Kenneth F. Bowen, was a defendant-appellee in the proceedings below, but is not a party to this Petition for Writ of Certiorari.

Appeals denying the City's petition for rehearing is reported at 649 F. 2d 336. The opinion of the District Court was not reported. These opinions are set out in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 1, 1981. A timely petition for a panel rehearing was denied on June 30, 1981 and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The due process clause and the taking clause of the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States and 42 U. S. C. § 1983, are involved in this case and are set forth in Appendix D.

STATEMENT OF THE CASE

Petitioner is a municipal corporation, incorporated under the laws of the State of Louisiana. In 1975, James E. Hernandez, the owner of a parcel of land located within the corporate limits of the City of Lafayette, instituted proceedings under the City's zoning ordinance to have his property rezoned from a residential classification to a medical office classification. The request was denied. Thereafter, Mr. Hernandez submitted a second request for an amendment seeking a multifamily (apartment) residential classification. This request also failed to become law.

Mr. Hernandez filed an action in state court challenging the City's failure to rezone his property. Prior to a hearing on

the merits, a tentative settlement agreement was reached which provided that the property would be rezoned to a commercial office classification. The rezoning contemplated in the agreement, however, failed to become law when the Mayor vetoed the rezoning ordinance and the City Council failed to override the veto. After the Mayor's veto but before the City Council's override vote, Mr. Hernandez instituted this action under 42 U. S. C. §§ 1983 and 1985 in the United States District Court for the Western District of Louisiana. The only remedy prayed for by Mr. Hernandez was money damages or "just compensation." After the City Council failed to adopt the rezoning ordinance overriding the Mayor's veto, the state court proceeding was restored to the trial calendar in accordance with the terms of the tentative settlement agreement.

In October, 1979 the Defendants, the City of Lafayette and Mayor Bowen, moved the federal district court for a judgment on the pleadings on the grounds that as a matter of law they were entitled to an absolute legislative immunity for acts taken in their legislative capacity. The United States District Court converted Defendants' motion into one for summary judgment and on December 13, 1979 entered summary judgment in favor of the Defendants. The court held that under the allegations of the complaint taken as true, the Defendants were entitled to absolute legislative immunity from suit for damages, as a matter of law. After a petition for rehearing was denied on February 11, 1980, Mr. Hernandez filed a timely appeal to the Fifth Circuit Court of Appeals.

In the meantime, a trial on the merits was held in the state court proceeding in January and February of 1980. On June 9, 1980 the District Court for the 15th Judicial District of the State of Louisiana entered judgment in favor of Mr. Hernandez holding that the City's zoning, as applied to his property, was constitutionally infirm. The City of Lafayette filed a timely appeal to the Third Circuit Court of Appeals for the State of Louisiana. On March 26, 1981 the Third Circuit Court of

Appeals reversed the judgment of the trial court and entered judgment in favor of the City of Lafayette, holding that the City's zoning ordinance as applied to Mr. Hernandez's property was valid. Mr. Hernandez's application for writ of certiorari or review was denied by the Supreme Court of Louisiana on June 22, 1981.

On May 1, 1981, the Fifth Circuit Court of Appeals issued an opinion which affirmed the Mayor's absolute immunity for acts taken in his legislative capacity but reversed in regard to the City of Lafayette. The City of Lafayette filed a timely petition for rehearing. On June 30, 1981 the Fifth Circuit held that as a matter of law money damages or "just compensation" is an appropriate remedy for an overly restrictive regulation.

BASIS FOR FEDERAL JURISDICTION IN THE COURT BELOW

The complaint, *sub judice,* invoked the jurisdiction of the federal courts under the provisions of 42 U. S. C. §§ 1983 and 1985 and 28 U. S. C. §§ 1331 and 1343. The allegations of the complaint, which were taken as true for the purposes of the summary judgment, state that the zoning ordinance of the City of Lafayette, as applied to Respondent's property, deprives him of his property without due process of law, takes his property for public use without just compensation, and denies him equal protection of the law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. The complaint further alleges that the City's failure to rezone Respondent's property were acts taken under color of state law.

REASONS FOR GRANTING THE WRIT

A.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE MUNICIPAL LIABILITY FOR MONEY DAMAGES FOR REGULATORY ACTIONS IS AN ISSUE OF GREAT IMPORTANCE LEFT UNDECIDED BY PRIOR DECISIONS OF THIS COURT.

The opinion of the Court of Appeals for the Fifth Circuit concludes that money damages are an appropriate remedy for a regulation that deprives a landowner of "an economically viable use of his land." In reaching that conclusion the Court of Appeals considered, and then indiscriminately mixed together, the question of whether an overly restrictive regulation constitutes a compensable governmental action under the just compensation clause and whether a municipality is entitled to an absolute legislative immunity for acts taken in a legislative capacity under 42 U. S. C. § 1983. The two issues are not coterminus, but the Court of Appeals treated them as one and in so doing further confused what were already complex and uncertain questions of law.

The decision of the Fifth Circuit Court of Appeals sought to be reviewed herein constitutes a significant departure from centuries of established jurisprudence in an area of the law already rife with conflict, confusion and uncertainty. *See for example, Metromedia Inc.* v. *City of San Diego,* ____ U. S. ____, 49 U. S. L. W. 4925 (July 2, 1981), Justice Rehnquist *dissenting* at 4942-43 where he laments the confused nature of a related area of local government law: ". . . where city planning commissions and zoning boards must regularly confront constitutional claims of this sort, it is a genuine misfortune to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn . . ." In the short time since the Fifth Circuit opinion was issued, it has

already contributed to further confusion in the area of municipal law. *See Couf* v. *DeBlaker,* 652 F. 2d 585 (5th Cir. 1981) and Hagman, *Temporary or Interim Damages Awards in Land Use Control Cases* (pts. 1 & 2), 6 ZONING & PLAN. L. REPORT 129, 137 (1981). The confusion is magnified by the fact that a flood of such cases has inundated the federal courts since this Court decided *Monell* v. *New York City Dept. of Social Services,* 436 U. S. 658 (1978) and *Owen* v. *City of Independence,* 445 U. S. 622 (1980). [2]

Petitioner asks this Court to take judicial notice of the fact that since the Fifth Circuit's decision sought to be reviewed herein, Petitioner has been made a Defendant in other lawsuits now pending in the federal and state courts of Louisiana seeking money damages for the City's zoning actions under 42 U. S. C. § 1983. (*Charles Janet Moore Thibadeaux* v. *City of Lafayette,* Case No. 81-0956, U. S. D. C. Western District of Louisiana; *Lafayette Parish Police Jury* v. *Welton P. Mouton,* Case No. 80-3738G, 15th Judicial District of the State of Louisiana.) If this Court denies the Petition for Writ of Certiorari, the Fifth Circuit Court of Appeals' opinion, together with its erroneous conclusions of law, will be the law of this case, as well as precedent for other cases under the doctrine of *stare decisis.*[3]

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[2] *See e.g., Clark* v. *Los Angeles,* 650 F. 2d 1033 (9th Cir. 1981); *Entertainment Concepts, Inc.,* v. *Maciejewski,* 631 F. 2d 497 (7th Cir. 1980), *cert denied* sub nom, *Maciejewski* v. *Entertainment Concepts, Inc.,* III, ____ U. S. ____, 101 S. Ct. 1366 (1981); *Bruce* v. *Riddle,* 631 F. 2d 272 (4th Cir. 1980); *Gorman Towers, Inc.* v. *Bogoslavsky,* 626 F. 2d 607 (8th Cir. 1980). Petitioner's counsel are aware of at least 226 cases in federal and state courts since *Monell* involving these issues.

[3] In its petition for rehearing, Petitioner asked the Fifth Circuit to consider whether the state court decision, *Hernandez* v. *City of Lafayette,* 399 So. 2d 1179 (La. App.), *writ denied,* ____ So. 2d ____ (La. 1981) was *res judicata;* however, the Fifth Circuit declined to reach the issue. The question of *res judicata* and the effect of the

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Petitioner respectfully submits that this case offers an ideal setting for resolution of the important questions of law that are raised in the Fifth Circuit's opinion. The case involves no factual disputes (the well-pled allegations of the complaint and its amendments and supplements thereto are taken as true for the purposes of the summary judgment reviewed by the Fifth Circuit.) The only question addressed in the trial court was a question of law. The decision of the Fifth Circuit only involved questions of law and questions of law are the sole subject of this Petition. The availability of compensation (or damages) as a remedy for an overly restrictive regulation is an exceedingly important issue, but has escaped consideration by this Court in *Agins* v. *City of Tiburon,* 447 U. S. 255 (1980) and *San Diego Gas & Electric Co.* v. *City of San Diego,* ____ U. S. ____, 101 S. Ct. 1287 (1981) because of procedural or jurisdictional defects. As a consequence, the convergence of recent trends under 42 U. S. C. § 1983 and the "taking issue" has yielded a state of disarray, fear and speculation among local governments. Petitioner submits that there are no procedural or jurisdictional defects in this case and that the Court should grant the Petition for Writ of Certiorari to clarify and stabilize the law in this vital area of municipal affairs.

B.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT'S "TAKING" ANALYSIS CONFLICTS WITH A PROPER READING OF THIS COURT'S OPINION IN *PENNSYLVANIA COAL* V. *MAHON*

In its May 1, 1981 opinion the Fifth Circuit concluded that an award of just compensation is an appropriate remedy for an

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state court decision is not raised in this petition and the eventuality that petitioner may raise *res judicata,* at some time in the future, in no way undoes the finality or the precedental impact of the decision sought to be reviewed.

overly restrictive police power regulation which effects a "taking." 643 F. 2d at 1197. The premise of the Fifth Circuit's decision is an out-of-context reading of a part of Justice Holmes' opinion in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922), which was relied upon in a dissenting opinion in *San Diego Gas & Electric Co.* v. *City of San Diego*, ____ U.S. ____, 101 S. Ct. 1287 (1981).

In his dissent to *San Diego Gas & Electric Co.*, Justice Brennan disagreed with the plurality of the Court on the jurisdictional issue and addressed the question of "whether a government entity's exercise of its regulatory police power can ever effect a 'taking' within the meaning of the Just Compensation Clause." *Id.* at 1301 (footnote omitted). The affirmative answer was based on a single sentence in *Pennsylvania Coal*,

> The principle applied in all these cases has its source in Justice Holmes' opinion for the Court in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415, 43 S. Ct. 67 L. Ed. 332 (1922) in which he stated: "*The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.*"

Id. at 1302 (emphasis added). Petitioner respectfully submits that this interpretation of *Pennsylvania Coal* that money damages or just compensation is an appropriate remedy in a suit challenging a police power regulation does not withstand scrutiny.

Few subjects have engendered more debate and confusion than the "taking issue". *See* F. Bosselman, D. Callies and J. Banta, THE TAKING ISSUE (1973). The confusion finds its origins in the Fifth Amendment which contains two limitations on governmental power over property: the due process clause and the just compensation clause. These two separate limitations have, unfortunately, been indiscriminately blended by the

courts into a potpourri of legalese that this Court has candidly conceded escapes precise definition. *See e.g., Penn Central Transp. Co.* v. *New York City,* 438 U. S. 104 (1978).

At the center of this maelstrom of legal debate is the manner in which the just compensation clause limits governmental regulations—is it a prohibition against "taking for public use" by regulation, or is it a constitutional requirement that just compensation must be paid whenever a governmental regulation goes too far? For almost two hundred years, the former interpretation has been the law of the land; however, the Fifth Circuit, relying on the dissenting opinion in *San Diego Gas & Electric,* adopts the latter, contrary view. The City of Lafayette submits that the conflict and confusion thereby created is of importance to literally every local government in the United States and respectfully prays that this honorable Court grant the Writ of Certiorari.

An examination of the *Pennsylvania Coal* opinion in its entirety, however, reveals that Justice Holmes' use of the word "taking" was not, as interpreted by the Fifth Circuit, intended to describe a compensable event. In *Pennsylvania Coal,* the coal company challenged the constitutionality of a state statute which prohibited subsurface mining that would result in the subsidence of roads and houses developed on the surface. The company's claim was that the statute deprived the company of its property without due process of law. The Supreme Court upheld the challenge and *invalidated* the state regulation. The Court did *not* find, as is often suggested, and now accepted by the Fifth Circuit, that the statute had *actually* effected a "taking" that required just compensation to be paid for the period in which the statute was in effect.

A reading of the *entire* opinion belies the compensation theory advanced by the Fifth Circuit, and in fact, supports the converse conclusion, that is, that a regulation which goes too far is *invalid,* and therefore a nullity. "It is our opinion that *the act*

cannot be sustained as an exercise of the police power . . . " 260 U. S. at 414 (emphasis added). Justice Holmes did not say that the State of Pennsylvania owed the coal company just compensation for the period the statute was in effect; rather, he said the "act cannot be sustained. . . ." If the State of Pennsylvania wanted to achieve a "taking", they could not do it by regulation.

> We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire *by a shorter cut than the constitutional way* of paying for the change.

Id. at 414 (emphasis added).

In other words, Holmes used the word "taking" as a short hand description of an invalid regulation, not as a talisman of a compensable event.[4] Support for this analysis of Holmes' use of the word "taking" is found in *Pennsylvania Coal* itself:

> [S]ome values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and *due process* clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases *there must be an exercise of eminent domain and compensation to sustain the act.*

260 U. S. at 413. (emphasis added.)

That Holmes intended the word "taking" as a "metaphorical"[5] description of a substantive limitation on the police

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[4] In fact, a plurality of this Court recognized this analysis in *San Diego Gas & Electric Co.* v. *City of San Diego,* ____ U. S. ____, 101 S. Ct. 1287, 1292 n. 8 (1981).

[5] Holmes' shorthand use of the word "taking" to describe an invalid regulation was cogently analyzed in *Fred F. French Investing* v. *City of New York* by Chief Judge Breitel of the New York Court of

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power, rather than as a basis for requiring payment of compensation, is evident from his prior opinions on the subject. In *Block* v. *Hirsch*, 256 U. S. 135 (1921), Holmes discussed constitutional limitations on exercises of the police power by reference to what is surely a precursor of the "taking" metaphor:

> All the elements of a public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes too far. For just as there comes a point at which the *police power ceases and leaves only that of eminent domain*, it may be conceded that regulations of the present sort pressed to a certain height might amount to a *taking without due process of law*.

Id. at 156. (emphasis added)

Similarly, in *Martin* v. *District of Columbia*, Holmes made it clear that he did not regard an overly restrictive regulation as triggering an award of compensation, rather that an actual

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Appeals. According to Breitel, Holmes did not use the word "taking" literally as an abstract rule of law, but as a mere "metaphor." 39 N. Y. 2d 587, 594-95, 350 N. E. 2d 381, 385-86, 385 N. Y. S. 2d 5, 9-10 (1975), *appeal dismissed*, 429 U. S. 990 (1976).

In his dissent in *San Diego Gas and Electric* v. *City of San Diego*, ____ U. S. ____ 101 S. Ct. 1287 (1981), Justice Brennan dismisses the metaphor analysis as "tampering with the express language of the opinion" of Justice Holmes. *Id.* at 1302 n. 14. As shown in the text, *supra*, the express language of Justice Holmes' entire opinion, taken in *pari materia* supports the metaphor analysis. Moreover, the issue in *Pennsylvania Coal Co.* v. *Mahon* was not whether the State of Pennsylvania's enactment of the Kohler Act was compensable, but whether the Act was *valid*. (See Argument for Plaintiff in Error "The statute *takes* the property of the Coal Company without *due process of law*," 206 U. S. 393, 395 (1922) (emphasis added).) In fact, one argument advanced by the coal company was that "[i]f surface support in the anthracite district is necessary for public use, it can constitutionally be acquired *only* by condemnation with just compensation to the parties affected." *Id.* at 400 (emphasis added).

taking under the Fifth Amendment could be accomplished only through an exercise of the power of eminent domain—not by regulation. 205 U. S. 135, 139 (1907). The most explicit statement of the Holmsean "taking" metaphor is found in *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349 (1908):

> [T]he police power may limit the height of buildings, in a city, without compenstion. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and *the police power would fail.* To set such a limit would need compensation and *the power of eminent domain.*

Id. at 355 (emphasis added).[6]

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[6] It has been suggested that Justice Holmes' use of the word "taking" in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922) constituted a substantial departure from accepted jurisprudence. (Chapter 8 of *F. Bosselman, D. Callies, & J. Banta, The Taking Issue* (1973), is entitled: PENNSYLVANIA COAL v. MAHON: HOLMES REWRITES THE CONSTITUTION.) To the contrary, the "taking" metaphor was in common usage as a short hand description of a regulatory action that was *invalid. See e. g. Bauman* v. *Ross*, 167 U. S. 548 (1897) ("failed to provide for the just compensation required by the Constitution . . . and . . . was . . . consequently . . . void. "*Id.* at 562 (emphasis added)). See also, *Bill Posting Sign Co.* v. *Atlantic City*, 71 N. J. L. 72, 58 A. 342 (1904); *Stockdale* v. *Rio Grande Western Ry. Co.*, 28 Utah 201, 209-10, 77 P. 849, 852 (1904); *Hartman* v. *Tresise*, 36 Colo. 146, 84 P. 685 (Colo. 1905); *State* v. *Robb*, 100 Me. 180, 60 A. 874 (1905); *Riley* v. *Town of Greenwood*, 72 S. C. 90, 96, 51 S. E. 532, 534 (1905); *M. Wineburgh Advertising Co.* v. *Murphy*, 129 A. D. 260, 113 N. Y. S. 855 (App. Div. 1908), aff'd 195 N. Y. 126, 88 N. E. 17 (1909); *City of St. Louis* v. *Dreisoerner*, 243 Mo. 217, 147 S. W. 998 (1912); *Vreeland* v. *Forest Park Reservation Commission*, 82 N. J. Eq. 349, 87 A. 435 (1913); *Standard Bill Posting Co.* v. *Hastings*, 77 Misc. 453, 137 N. Y. S. 186 (Sup. Ct.), aff'd 153 A. D. 920, 138 N. Y. S. 1137 (1912), aff'd 207 N. Y. 763, 101 N. E. 1118 (1913); *Romar Realty Co. Board of Commissioners of Haddonfield*, 96 N. J. L. 117, 114 A. 248 (1921); *In*

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There is simply no basis for concluding that Holmes perceived that a regulation actually becomes an exercise of the power of eminent domain because a court concludes that the regulation "goes too far."[7] Holmes' use of the word "taking" was not intended to mean that an over-zealous regulation constitutes a compensable event; rather that a regulation which has an impact on property equivalent to a "taking," is invalid,

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re Kansas City Ordinance No. 39946, 298 Mo. 569, 252 S. W. 404 (1923); *Piper* v. *Ekern*, 180 Wis. 586, 194 N. W. 159 (1923) *Heller* v. *Village of South Orange*, 3 N. J. Misc. 1076, 130 A. 534 (1925); *Ware* v. *City of Wichita*, 113 Kan 153, 214 P. 99 (1923); *Johnson* v. *City of Charleston*, 91 W. Va. 318, 112 S. E. 577 (1922). *State* v. *Hillman*, 110 Conn. 92, 147 A. 294 (1929). In not one of these cases is the term "taking" as applied to a regulatory action given the meaning ascribed to the term by the Fifth Circuit.

[7] Perhaps the best explanation of Holmes' recourse to the "taking" metaphor is the judicial environment at the time of the *Pennsylvania Coal Co.* v. *Mahon* decision. Holmes was an outspoken critic of the Supreme Court's use of substantive due process as a vehicle for invalidating state legislation. *See e.g. Lochner* v. *New York*, 198 U. S. 45 (1905) (Holmes, J., dissenting). He openly decried the Court's open-ended use of due process whereby judicial judgments were substituted for that of legislative branches of government. In *Pennsylvania Coal*, however, Holmes found himself confronted by a statute that he apparently could not support ("The damage is not common or public. The extent of the public interest is shown by the statute to be limited . . ." 260 U. S. 393, 413 (1922) (citation omitted).) Yet to invalidate the statute as violative of the due process clause would have placed Holmes in the unthinkable position of invoking substantive due process to invalidate a state statute. His use of the "taking" metaphor permitted Holmes to invalidate the act on the basis of substantive due process but with a limitation that was not open-ended because his standard was limited to an objective determination of beneficial use. It would be an unfortunate irony if Holmes' attempt to limit judicial interference with legislative policy to its narrowest possible confines were, 60 years later, to serve as the vehicle for the most disruptive judicial incursion ever into the legislative process, a decision that would convert every invalid legislative act into a crippling claim on the public fisc.

void *ab initio.* If the government wishes to achieve such an impact on property, that is, the equivalent of a taking, it must do so through an exercise of the power of eminent domain, not through regulation. "When [a restrictive regulation] ... reaches a certain magnitude, in most if not in all cases *there must be an exercise of the power of eminent domain. ...*" 260 U.S. at 413 (emphasis added).

C.

THE COURT OF APPEALS' OPINION CONFLICTS WITH THE OPINION OF ANOTHER COURT OF APPEALS AND THE OPINIONS OF MANY STATE COURTS AS TO THE PROPER REMEDY FOR A "TAKING" AND IS NOT SUPPORTED BY DECISIONS OF THIS COURT

That an overzealous regulation which is a "taking" is not a compensable act is confirmed by long-established jurisprudence. For example, in *Pamel Corp.* v. *Puerto Rico Highway Authority,* 621 F. 2d 33, 35 (1st Cir. 1980) the First Circuit Court of Appeals recited that:

> The substantive allegation is familiar. Regulation of property use may be so oppressive or arbitrary that it crosses the wavering line separating a valid exercise of the police power from an exercise of the eminent domain power, which would be invalid without payment of the just compensation mandated by the due process clauses of the Fifth and Fourteenth Amendments. The remedy awarded in such cases, however, has not been the awarding of the value of the diminished property right, but *a declaration of the invalidity* of the purported exercise of the police power. (emphasis added) (citations omitted.)

See, also, Mailman Development Corp. v. *City of Hollywood,* 286 So. 2d 614, 615 (Fla. Dist. Ct. App. 1973), *cert. denied,* 293 So. 2d 717 (Fla.), *cert. denied,* 419 U.S. 844 (1974); *Agins* v. *City of Tiburon,* 24 Cal. 3d 266, 598 P. 2d 25,

157 Cal. Rptr. 372 (1979), aff'd, 447 U.S. 255 (1980); *Jacobson* v. *Tahoe Regional Planning Agency*, 474 F. Supp. 901, 903 (D. Nev. 1979); *Eck* v. *City of Bismark*, 283 N. W. 2d 193 (N. D. 1979); *Gary D. Reihart, Inc.* v. *Township of Carroll*, 487 P. 2d 461, 409 A. 2d 1167 (1979); *Pope* v. *City of Atlanta*, 242 Ga. 331, 249 S. E. 2d 16 (1978), *cert. denied*, 440 U. S. 936 (1979); *Holaway* v. *City of Pipestone*, 269 N. W. 2d 28 (Minn. 1978); *Davis* v. *Pima County*, 121 Ariz. 343, 590 P. 2d 459 (1978), *cert. denied*, 442 U. S. 942 (1979); *Gold Run, Ltd.* v. *Board of County Commissioners*, 38 Colo. App. 44, 554 P. 2d 317 (1976); and *Visidor Corporation* v. *Borough of Cliffside Park*, 48 N. J. 214, 225 A. 2d 105 (1966), *cert. denied*, 386 U. S. 972 (1967).

In the face of this settled law, the Fifth Circuit points to a number of cases for the proposition that a regulation actually effects a compensable taking. However, a review of these cases reveals that not one of them involved a holding that compensation was required for an overly restrictive regulation.

In *Agins* v. *City of Tiburon* this Court stated:

> The application of a general zoning law to a particular property effects a *taking* if the ordinance *does not substantially advance legitimate state interests, or* denies an owner economically viable use of his land.

447 U. S. at 260 (emphasis added) (citations omitted).

This passage clearly states that a regulation which fails to advance a legitimate state interest (which it is settled violates the *due process clause*) is a "taking," an obvious use of the word "taking" in its metaphorical sense as a shorthand description of a regulation that is *invalid.*

Similarly in *Penn Central Transp. Co.* v. *New York City*, the word "taking" is used frequently in an analysis of the City of New York's landmark preservation regulations. 438 U. S. 104, 123-24 (1978) (citations omitted).

However, the opinion never suggests that a regulation that goes too far requires a payment of just compensation. To the contrary, the opinion explicitly states that such a regulation is *invalid.*

> Indeed, we have frequently observed that whether a particular restriction will be rendered *invalid* by the Government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."

Id. at 124 (emphasis added) (citation omitted).[8]

The distinction between a literal "taking for public use" and a metaphorical "taking" is not an academic issue. When-

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[8] *See also, Maher* v. *City of New Orleans,* 516 F. 2d 1051 (5th Cir. 1975), *cert. denied,* 426 U. S. 905 (1976), where the court quite clearly used the word "taking" in its metaphorical as opposed to its literal sense within the just compensation clause.

> "To survive attack as a *taking,* the zoning regulation must—as a threshold [sic] matter—satisfy the *due process* requirements that its purpose and means are reasonable".

Id. at 1065 (emphasis added). *Accord, Trustees Under Will of Pomeroy* v. *Town of Westlake,* ("Zoning action which deprives an owner of all practical use of his property . . . is *unconstitutional* [that is, invalid]." 357 So. 2d 1299, 1304 (La. App.), *cert. denied,* 359 So. 2d 205 (La. 1978) (emphasis added).) In *Prune Yard Shopping Center* v. *Robins,* 447 U. S. 74 (1980), this Court indicated only that an attempt to effect a "taking" without payment of just compensation, would be *unlawful,* that is invalid. In *Andrus* v. *Allard,* 444 U. S. 51 (1979) the word "taking" is used only as a shorthand description of a regulation which is invalid. *Kaiser Aetna* v. *United States,* did not involve a regulatory program alleged to be overly restrictive; however, this Court was careful to point out that if the government wanted to "take" the interest involved, it could do so *only* by "invoking its eminent domain power *and* paying just compensation . . ." 444 U. S. 164, 180 (1979) (emphasis added).

ever private property is taken for public use, just compensation *must* be paid. If Holmes' metaphorical use of the word "taking" is given literal effect then the courts will be *obligated* to order compensation in every case of invalidity. This judicial transmogrification of regulatory enactments into exercises of the power of eminent domain would upset the delicate balance between the co-equal branches of government that has served our nation for 200 years and have far reaching effects on the doctrine of separation of powers.[9]

Legislative deliberations to enact police power regulations and to exercise the power of eminent domain are not identical, either in scope or in effect. Both involve an inquiry into the need for the public objective under consideration and the effect of the proposed action on the property in question, its immediate neighborhood, and the community as a whole. If the objective can be met with a regulation, then the city's inquiry need go no further. However, if the objective can only be achieved through an exercise of the power of eminent domain, then the city must go further and make a cost/benefit analysis of the proposal and balance the particular objective and its projected cost against all other public objectives which are competing for available budget monies. If the courts were to award compensation for overly restrictive regulations, this fundamental policy-making process of how and where available monies should be spent will inevitably become a judicial responsibility. That result flies directly in the face of Justice Holmes' well-known deference to legislative discretion in the policy area.

The balance of powers is easily preserved, however, if the police power and the power of eminent domain are recognized as separate and distinct powers, and if relief from overly restrictive regulations is limited to declaratory and injunctive

[9] *Marbury* v. *Madison*, 5 U. S. (1 Cranch) 137 (1803).

relief.[10] By striking an overly restrictive regulation, the courts preserve the legislature's opportunity to make a cost-benefit decision because the legislature can then choose between relaxing the applicable regulations, or if they determine that the desired objective merits a budgetary allotment, institute eminent domain proceedings.[11] In this way the balance of powers is preserved and the constitutional wrong is vindicated. When it is realized that most state courts have, in deference to the prerogatives of the legislative branch, limited themselves to declaring zoning ordinances to be valid or invalid and have refused even to direct how an invalid regulation should be amended by the legislature, the magnitude of the Fifth Circuit's intrusion becomes obvious.[12]

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[10] "If a zoning ordinance is enjoined, the legislative body, rather than the court, can then decide whether the social benefits flowing from the plan warrant the exercise of eminent domain and the expenditure of public resources. When the legislature decides that the costs outweigh the benefits, it can either abandon the objective entirely, enact less stringent regulation, or combine regulation with compensation."

Jacobson v. *Tahoe Regional Planning Agency*, 474 F. Supp. 901, 904 (D. Nev. 1979).

This approach was also followed by an appellate court in Florida in *Askew* v. *Gables-By-The-Sea, Inc.*, 333 So. 2d 56 (Fla. Dist. Ct. App. 1976), *cert. denied*, 345 So.2d 420 (Fla. 1977).

[11] Recognition of the metaphorical character of the word "taking" reveals that the better view is that the injury suffered during the period an invalid legislative enactment is in effect is *damnum absque injuria* and a mere incident of citizenship. In *Agins* v. *City of Tiburon*, *supra* this Court recently noted that a similar period of inconvenience (on-again-off-again condemnation proceedings) did not constitute a taking of property in the constitutional sense.

> Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay are "incidents of ownership . . ."

447 U. S. 255, 263 n.9 (1980) (citations omitted).

[12] *See*, e.g., *Conway* v. *Housing Authority*, 266 Ark. 404, 584 S.W.

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D.

THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE OPINION OF THE FIFTH CIRCUIT CONFLICTS WITH THE OPINIONS OF THIS COURT ON THE AVAILABILITY OF LEGISLATIVE IMMUNITY

The Fifth Circuit Court of Appeal held that a municipality is not "entitled to absolute legislative immunity from damages for its legislative acts" and therefore, presumably, that a municipality is strictly liable for damages for legislation which is declared to be unconstitutional. 643 F. 2d at 1197. That holding, which the Fifth Circuit attributes to *Owen* v. *City of Independence,* 445 U. S. 622 (1980), is irreconcilably in conflict with the opinions of this Court, and in particular *Supreme Court of Virginia* v. *Consumers Union,* 446 U. S. 719 (1980).

In *Owen,* this Court considered whether a municipality was "entitled to qualified immunity from liability" based on the good faith of its officials. The question of legislative immunity was not at issue. The Fifth Circuit, however, seized on two phrases of this Court's opinion, and taking them out of context, concluded that this Court's determination that a good faith immunity did not pre-exist the enactment of the Civil Rights Act of 1871, means *per force,* that no immunity of *any* kind was accorded to municipalities. Petitioner respectfully submits that the Fifth Circuit's approach and conclusion are untenable,

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2d 10 (1979); *See also,* Mandelker, *Land Use Takings: The Compensation Issue,* 8 HASTINGS CONST. L. Q. 491, 504 (1981) ("Most state courts view specific relief of this kind as improper judicial interference with local legislative powers."); A. Rathkopf, 3 THE LAW OF ZONING AND PLANNING 36-10 (4th ed. 1981) ("The ultimate classification of lands under zoning ordinances involve[s] the exercise of legislative power and, under the doctrine of separation of powers, this field may not be invalidated by the courts. This is the majority rule.")

particularly in light of this Court's opinion in *Supreme Court of Virginia.*

In *Supreme Court of Virginia,* this Court addressed the available immunities for the Virginia Supreme Court itself, as well as that of the individual justices. After a discussion of the tradition of absolute immunity for legislators, this Court accorded the Virginia Supreme Court the identical absolute immunity available to individual legislators.[13] "[T]he *Virginia Court and* its members are immune from suit when acting in their legislative capacity." 446 U. S. at 734. Application of the analysis used in *Supreme Court of Virginia* to the instant matter yields an absolute immunity for acts taken in a legislative capacity for both individual legislators and the legislative bodies they comprise, a result that is in direct conflict with the Fifth Circuit's decision, *sub judice.*

As consistently stated by this Court, the Civil Rights Act of 1871 did not abrogate pre-existing common law immunities. *E.g. City of Newport* v. *Fact Concerts, Inc.,* ____ U. S. ____, 49 U. S. L. W. 4860 (June 26, 1981) and *Tenney* v. *Brandhove,* 341 U. S. 367, 376 (1951). If a claimed immunity satisfies a two-step test, the immunity is held to remain available. "Where the immunity claimed by the defendant was well-established at common law at the time § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity." *Owen* v. *City of Independence,* 445 U. S. 622, 638 (1980).

1.

Absolute immunity for municipalities for legislative activities was well-established in 1871 when the Civil Rights Act was

[13] Not one of the cases cited in *Supreme Court of Virginia* for the contours of legislative immunity involved a legislative body; nevertheless, this Court obviously recognized that the policies supporting individual immunity also supported immunity for the legislative body.

adopted. For example, in *Weightman* v. *The Corporation of Washington,* 66 U. S. (1 Black) 39, 49-50 (1862), this Court made reference to the absolute immunity available to municipalities for legislative actions:

> Such powers are generally regarded as discretionary, because, in their nature, they are *legislative;* and although it is the duty of such corporations to carry out the powers so granted and make then beneficial, still *it has never been held that an action on the case would lie against the corporation, at the suit of an individual, for the failure on their part to perform such a duty.* (emphasis added)[14]

In the face of this precedent, the Fifth Circuit concludes that the Fifth Amendment proscription against taking without just compensation somehow constitutes a waiver of absolute legislative immunity. 643 F. 2d at 1198. The flaw in the Court's analysis is that no one, least of all the City of Lafayette, doubts the constitutional requirement of just compensation.[15] The defense raised by the City was not an immunity from just compensation, but an immunity from *damages* for legislative enactments that are adjudicated to be constitutionally infirm. In part, of course, the Fifth Circuit's misadventure is attributable to the court's incorrect literal reading of the word "taking." Recognition that the word "taking" is used by the courts, not as a description of a compensable event, but as a shorthand description of invalidity, "melts away" the Fifth Circuit's premise of no established tradition of immunity. Not one of the

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[14] *See also, Fowle* v. *Common Council of Alexandria,* 28 U. S. (3 Pet.) 398, 409 (1830); *Kelley* v. *City of Milwaukee,* 18 Wisc. 83 (1864); *Griffin* v. *Mayor & Council of New York,* 9 N. Y. 456 (Ct. App. 1853).

[15] It is well-established that the just compensation clause has nothing to do with damages for injury to property. *See e.g. Northern Transportation Co. of Ohio* v. *City of Chicago,* 99 U. S. 635 (1879).

cases cited by the Fifth Circuit involved an invalid regulation that was a "taking," rather, each case involved an actual invasion of property.[16]

For example, *Sumner* v. *Philadelphia*, 23 F. Case 392 (C. C. E. D. Pa. 1873) (No. 13,611) involved an award of damages by a district court for the wrongful detention of a ship in quarantine by officers of the City's Board of Health. *Sumner* simply had nothing to do with legislative immunity. Furthermore, each of the cases cited in *Sumner* in support of its award of damages also involved actual takings. *See, United States* v. *Russell*, 80 U. S. (13 Wall.) 623 (1871) (under military emergency the government used privately owned, officered, and manned steamers); *Bishop & Parsons* v. *Mayor*, 7 Ga. 200 (1849) (plaintiff's building was actually destroyed by fire fighters in order to prevent the further spread of the fire).

It is not surprising that there are few cases which explicitly address the issue of municipal legislative immunity. Municipalities, as legislative bodies, were presumed to be immune and it would have been unthinkable that an individual could seek money damages from a legislature because it failed to legislate

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[16] The Fifth Circuit attempts to bolster its argument that there is no "well-established tradition of municipal immunity from damages to compensate for uncompensated takings" by citing four cases decided under Louisiana law. 643 F. 2d at 1197 n. 19. None of the cases cited support the proposition that the enactment of an ordinance or, as in this case, the *failure* to enact an ordinance can result in an award of damages. All the cases cited involved damages to property resulting from the construction of navigation or drainage improvement projects or the *actual* appropriation of private property.

Louisiana jurisprudence has carefully distinguished the exercise of the police power from the power of eminent domain. *See Columbia Gulf Transmission Co.* v. *Hoyt*, 252 La. 921, 215 So. 2d 114 (1968); *Trustees Under Will of Pomeroy* v. *Town of Westlake*, 357 So. 2d 1299 (La. App.), *cert. denied*, 359 So. 2d 205 (La. 1978); *Bernard* v. *State Dept. of Public Works*, 127 So. 2d 774 (La. App. 1961).

in accordance with his personal preferences.[17] A noted legal scholar of the period, George W. Field, in his volume *The Law of Damages* (1876) (cited by this Court in *City of Newport* v. *Fact Concerts, Inc.*, ____ U. S. ____, 48 U. S. L. W. 4860, 4863 (June 26, 1981)), gave this suggestion short shrift:

> "The true doctrine is that the powers conferred . . . are of a legislative and governmental nature, for a defective execution of which the city cannot be held liable."

FIELD, at 33, citing Day, J. in *Ogg* v. *The City of Lansing*, 35 Iowa 495 (1872).[18]

2.

The second step of the test as to whether an immunity for damages should be given effect under 42 U. S. C. § 1983 is

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[17] Moreover, in construing the extent of municipal immunity from damages under the Civil Rights Act of 1871, the Fifth Circuit failed to consider the nature of the modern municipality. The municipality of 1870 was a limited purpose arm of the state confined to the exercise of narrowly defined powers. Little, if any, policy making discretion was delegated to local government and judicial scrutiny carefully controlled any expansive view of municipal authority or character. *See* McQuillin, THE LAW OF MUNICIPAL CORPORATIONS §§ 1.08 *et seq.* (3rd ed. 1971). That subordinate creature, however, is unrelated to the 20th century municipality. No longer are the state's powers presumed *not* to be delegated to local government; rather, the modern home rule city is empowered to exercise the state's full panoply of powers except as specifically preempted by statute. McQuillin at § 1.40.

[18] See also, *Smoot* v. *Mayor, etc., of Wetumpka*, 24 Ala. 112, 121 (1854) (no damage liability for exercise of discretionary, legislative power); *Brinkmeyer* v. *City of Evansville*, 29 Ind. 187, 191-195 (1867) (no liability for damages for exercises of legislative function); *Dewey* v. *City of Detroit*, 15 Mich. 307, 312 (1867); *Wheeler* v. *City of Cincinnati*, 19 Ohio St. 19, 21-22 (1869); *Western College of Homeopathic Medicine* v. *City of Cleveland*, 12 Ohio St. 375 (1861); *City of Oklahoma City* v. *Hill*, 6 Okla. 114, 137, 50 P. 242, 249 (1897).

whether the rationale of the immunity is compatible with the purposes of the Civil Rights Act and whether there are "countervailing considerations" which counsel against abolishing the immunity. The City of Lafayette respectfully submits that recognition of the well-established legislative immunity for local government is compatible with the Civil Rights Act and that important public policy considerations require that this immunity from damages continue.

Immunizing legislative bodies against claims for damages for legislative acts does not deprive aggrieved landowners of meaningful relief. Injunctive and declaratory relief striking the offending legislation, together with attorney's fees under 42 U. S. C. § 1988, constitute a meaningful remedy by which unconstitutional legislative actions are "fully redressable." The immunity is compatible, therefore, with the purposes Civil Rights Act of 1871.

The inadvisability of a damage remedy for acts taken in a legislative capacity is not, however, just a matter of alternative available remedy. There are strong public policies which militate *against* a damages remedy, a circumstance this Court in *Owen* v. *City of Independence,* 445 U. S. 622 (1980), recognized: "A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees. . . . *Unless countervailing considerations counsel otherwise, the injustice . . . should not be tolerated.*" *Id.* at 651 (emphasis added) (footnote omitted). In *Owen,* several traditional justifications for immunity were addressed, but rejected because *Owen* dealt with a good faith qualified immunity for administrative or managerial functions. The rejection of a good faith immunity, however, does not undo the cogency of an immunity from damages remedy for actions taken in a *legislative capacity.*

Local governments are extremely sensitive to the fiscal implications of their decisions. Unlike state and federal legislators who are far removed from the reach of disgruntled

taxpayers, the local legislator is extremely visible and strictly accountable for his other fiscal actions. It is in this context that the existence of a cause of action for damages for legislative acts would "paralyze" local government, particularly in the area of zoning legislation. Land use controls involve broad policy-making decisions—policies that are specifically and uniquely within the wisdom and discretion of governing bodies. The breadth of discretion and the tradition of judicial deference accorded such municipal prerogatives were recognized by Justice Douglas in his well-known "blessings of quiet seclusion" opinion, *Village of Belle Terre* v. *Boraas*, 416 U. S. 1, 6 (1974), would be substantially undone, if not destroyed, if the exercise of legislative discretion is answerable in a tort action for damages.[19]

In *Owen*, this Court notes that one of the justifications for immunity is that the threat of personal monetary liability "will introduce an *unwarranted and unconscionable consideration into the decisionmaking process*, thus paralyzing the governing official's decisiveness and distorting his judgment on matters of public policy." 445 U. S. at 655-56 (emphasis added) (footnote omitted). This Court rejected that justification for executive and administrative immunities (the Court refers to "officials" and "employees") because it could discern no tradition of good faith immunity. This Court did not say nor does it seem likely that it could say, that the availability of a tort action for

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[19] *See Schad* v. *Borough of Mount Ephraim*, ____ U. S. ____, 101 S. Ct. 2176 (1981), Burger, C. J. *dissenting* at 2191-92. "Because I believe that a community of people are—within limits—masters of their own environment, I would hold that, as applied, the ordinance is valid. . . .

• • •

The towns and villages of this nation are not, and should not be forced into a mold cast by this Court. Citizens should be free to choose to shape their community so that it embodies their conception of the "decent life."

damages for legislative acts would not introduce an extraneous factor into public *policy* decisionmaking. It would be a bold legislator indeed who would support legislation which is assailed as violative of the Constitution if a damages remedy were available. No one familiar with the delicacy of local land use policy-making at the local level could think for a moment that the threat of money damages, no matter how ill-founded, would not substantially affect legislative discretion.[20] The availability of damages for acts taken in a legislative capacity would stifle, if not paralyze, local government's capacity to respond to the needs of its citizens.

The oppressive character of the Fifth Circuit's holding is exacerbated by the fact that unlike other issues which municipalities face, a court's reaction to the validity of proposed land use legislation is difficult, if not impossible, to predict. The legislator who wishes to evaluate the substantive validity of proposed legislation before acting faces an almost impossible task in the area of land use controls. *See, Penn Central Transp. Co.* v. *New York City,* 438 U. S. 104, 124 (1978); *Kaiser Aetna* v. *United States,* 444 U. S. 164, 175 (1979); *Metromedia, Inc.* v. *City of San Diego,* ____ U. S. ____, 49 U. S. L. W. 4925, 4942-43 (July 2, 1981) (Rehnquist, J., dissenting).

Against this backdrop of uncertainty, the "threat" of damages for actions taken in a legislative capacity would inevitably overwhelm all other policy considerations. The substantive merits of proposed legislation would be subsumed in a debate over whether a municipality's fiscal position is such that the municipality can afford to take a chance and adopt remedial legislation. To suggest that a damages remedy will not introduce unwarranted considerations into legislative deliberations is difficult to accept by anyone familiar with the local legislative process.

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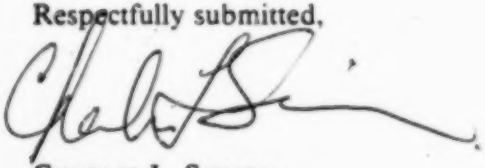
[20] See R. Babcock, THE ZONING GAME (1966).

CONCLUSION

The issue of monetary damages or just compensation as a remedy for overly restrictive police power regulations is of utmost importance to local governments across the nation. Under extant, conflicting jurisprudence, the scope of liability is uncertain and in dispute. The Fifth Circuit's literal use of the word "taking" is not supported by precedent and will inexorably draw the courts into the daily affairs of local government in an ironic perversion of Justice Holmes' philosophy of deference to legislative discretion: "The widest scope must be permitted to the inventions of statesmanship, the experimentation and bunglings of legislatures." Frankfurter, "*Twenty Years of Mr. Justice Holmes' Constitutional Opinions,*" 8 Harv. L. Rev. 910, 928-9 (1923). Neither the Constitution nor the legislative history of the Civil Rights Act of 1871 provides any basis for a judicial determination that now, after 200 years of consistent constitutional jurisprudence during which the recognized remedy for unconstitutional regulation was invalidation, the balance should be tilted away from deference to legislative discretion to a judicial theory of cost spreading. The City of Lafayette respectfully submits that the fundamental character of the issues treated in the Fifth Circuit's opinion and the extent to which the opinion conflicts with established jurisprudence compels review by this Court in order to ensure that future decisions of local government can be made in a legal climate of certainty and fairness.

For all of the foregoing reasons petitioner respectfully prays that this Honorable Court grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review its decision in this case.

Respectfully submitted,



CHARLES L. SIEMON
WENDY U. LARSEN
ROSS, HARDIES, O'KEEFE, BABCOCK & PARSONS
One IBM Plaza, Suite 3100
Chicago, Illinois 60611
(312) 467-9300
Counsel for Petitioner

Of Counsel
RICHARD F. BABCOCK
SUSAN LICHTENFELD
BARBARA ROSS

APPENDICES

TABLE OF CONTENTS

PAGE

APPENDIX A

(1) Opinion of the United States Court of Appeals for the Fifth Circuit, Unit A, dated May 1, 1981 . 2a

(2) Denial of Petition for Rehearing by the United States Court of Appeals for the Fifth Circuit, Unit A, dated June 30, 1981 ..... 26a

APPENDIX B

(1) Ruling of the United States District Court for the Western District of Louisiana, dated December 13, 1979 ..... 2b

(2) Judgment of the United States District Court for the Western District of Louisiana, dated December 13, 1979 ..... 5b

(3) Denial of Motion for New Trial by the United States District Court for the Western District of Louisiana, dated February 11, 1980 ..... 6b

APPENDIX C

(1) Judgment of the United States Court of Appeals for the Fifth Circuit, dated May 1, 1981 ..... 2c

APPENDIX D

(1) Constitutional Provisions 2d

(2) Statutes 2d

APPENDIX A

(1) Opinion of the United States Court of Appeals for the Fifth Circuit, Unit A, dated May 1, 1981

(2) Denial of Petition for Rehearing by the United States Court of Appeals for the Fifth Circuit, Unit A, dated June 30, 1981

James E. Hernandez,

Plaintiff-Appellant,

v.

City of Lafayette et al.,

Defendants-Appellees.

No. 80-3160.

United States Court of Appeals,
Fifth Circuit.
Unit A

May 1, 1981.

Appeal from the United States District Court for the Western District of Louisiana.

Before GOLDBERG, REAVLEY and TATE, Circuit Judges.

REAVLEY, Circuit Judge:

In this § 1983 action, plaintiff, James E. Hernandez, appeals from the district court's granting of summary judgment in favor of defendants, the City of Lafayette, Louisiana, and its mayor. The plaintiff alleged that the city, through its zoning ordinances and its failure to rezone his land, had deprived him of property without due process of law and without just compensation under the Fifth and Fourteenth Amendments. The district court granted defendants' motion for judgment on the pleadings, which was converted to a motion for summary judgment by the plaintiff's filing of additional documentary evidence,[1] on the ground that the city and its mayor were immune from suit under 42 U.S.C. § 1983. We affirm the district court's judgment as to the mayor, but reverse as to the city.

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[1] *See* Fed.R.Civ.P. 12(c).

Background

James E. Hernandez is the owner of a 16.7 acre tract of land situated within the corporate limits of the City of Lafayette, Louisiana. It is located immediately to the south of South College Drive at West Bayou Parkway and is bounded on the east by Coulee Mine,[2] on the west by West Bayou Parkway and the sewage treatment plant access road, and on the south by the Southside Sewerage Treatment Plant.

At the time this suit was filed in 1979, the Hernandez property had been zoned R1-A (single family residential) for more than ten years. It remains zoned R1-A to this day. On August 12, 1975, plaintiff made his first request with the Lafayette City Planning Commission for a change in zoning. He requested that the property be rezoned from R1-A to B1-M (medical office complex). Shortly thereafter, the city began planning a realignment of South College Drive and West Bayou Parkway, which borders plaintiff's land. The proposed realignment would bisect the Hernandez property into two unequal parts, which would necessitate the city's expropriation of the right-of-way by eminent domain proceedings.

In December of 1975, an ordinance to rezone the Hernandez property from R1-A to B1-M, which had been recommended by the planning commission's staff, was introduced by unanimous vote of the Lafayette City Council. A vote on final approval of the rezoning ordinance was postponed several times during the early part of 1976. On March 16, 1976, the ordinance to rezone the Hernandez property to B1-M was again scheduled to come up for final approval before the city council. At this meeting, the council was also to consider certain rights-of-way which plaintiff agreed to grant the city in return for final approval of the rezoning ordinance. Because of the impending city council election, however, the council voted to table the rezoning ordinance.

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[2] Coulee Mine is a medium-sized stream.

The council took no further action on the rezoning of plaintiff's property until January 11, 1977, when it adopted a resolution requesting the planning commission to reconsider the matters contained in plaintiff's rezoning petition filed in August of 1975. After public hearings on plaintiff's rezoning petition, the planning commission recommended that the request to rezone plaintiff's property from R1-A to B1-M be denied. The city council agreed, denying final approval to the rezoning ordinance. With respect to this rezoning ordinance, one councilman was recorded as stating that "if we change zoning to another classification we are going to have to pay more money when we create the right-of-way."

On August 9, 1977, the plaintiff filed a request with the city to change the zoning classification of his property from R1-A to R2 (multi-family residential). The staff of the city planning commission recommended that an R2 classification be granted for the Hernandez property. After conducting a public hearing on the subject, the planning commission voted to recommend the change to R2 to the city council. On November 17, 1977, the city council tabled the rezoning request for an R2 classification and ordered the planning commission to conduct an additional hearing to study possible zoning options for the Hernandez property. The council's reason for this action was to allow the planning commission to consider a B1-M classification in addition to the R2 classification.

On December 18, 1977, the city council voted to appropriate $140,000 for an engineering feasibility study for the proposed realignment of West Bayou Parkway. On January 9, 1978, the city planning commission, contrary to the city council's instructions, voted to exclude the Hernandez rezoning matter from a comprehensive hearing scheduled for February 8, 1978. The commission's reason for this action was that it wanted to wait and see if the proposed realignment project would become a reality before it took any action. The city

council upheld the planning commission's actions, basing its decision on the belief that it would be better to postpone any final decision on rezoning the Hernandez property until the city had determined the route of the proposed realignment project.

After attempting to obtain a change in zoning for two and one-half years, and believing that no zoning change would be forthcoming until the city had acquired a right-of-way over his property at either R1-A prices[3] or as part of a concession by him in return for the desired zoning classification, the plaintiff, on February 3, 1978, filed suit in state court for a mandatory injunction to compel the city to change the R1-A zoning classification on his property. On February 21, 1978, the city council voted to rezone the Hernandez property to R2. The mayor, however, vetoed this measure, and the council failed to override the mayor's veto. In January of 1979, the city attorney began negotiations with the plaintiff to settle the pending lawsuit in state court, which was set for trial on February 7, 1979.

An informal settlement agreement was reached whereby the city would rezone the plaintiff's property to a B1-O classification (limited office). The settlement agreement was signed by both the city council and the mayor. The plaintiff notified the state court of the settlement agreement, and the trial date was cancelled. One month later, the mayor refused to sign the formal settlement agreement that would have terminated the state court suit. Moreover, the mayor subsequently vetoed an ordinance, unanimously passed by the city council, that would have rezoned the plaintiff's land to a B1-O classification. The council was again unsuccessful in its attempt to overturn the mayor's veto. A trial date in the state court suit was reset for January of 1980.[4] In the aftermath of these events, the city

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[3] It is undisputed that the market value of the Hernandez property would be greater under a zoning classification less restrictive than R1-A.

[4] The state court rendered judgment in plaintiff's favor, finding that the city's actions were unreasonable, arbitrary and capricious and had deprived the plaintiff of all practical use of his property.

council repealed the ordinance declaring the West Bayou Parkway realignment a "public necessity" upon advice of the city's legal counsel that the city would be in jeopardy of losing the state court lawsuit unless the proposed realignment project was abandoned.

In March of 1979, plaintiff filed this suit under 42 U.S.C. § 1983. He complains that because the city planned to build a road through his property, it delayed making a final decision on the rezoning of his property in an effort to maintain the depressed market value of his land as zoned R1-A so that the city's expropriation costs of a right-of-way across plaintiff's land would be kept to a minimum. The district court, noting that zoning is a legislative function of a municipality, *Four States Realty Co., Inc. v. City of Baton Rouge*, 309 So.2d 659, 664 (La.1975), and that after *Monell*[5] a municipality is not absolutely immune when exercising its legislative functions, held that in this case, where the claimed deprivation is the result of the city's failure to act promptly (rather than its affirmative enactment of an unconstitutional law or official policy) and where no discrimination or equal protection deprivation is asserted,[6] the city is immune from suit under § 1983. With respect to the mayor, the district court concluded that the mayor was acting in a legislative capacity when he vetoed the two ordinances which would have rezoned the Hernandez property and held, therefore, that the mayor enjoyed the same absolute legislative immunity from suit under § 1983 that is accorded to state and local legislators.

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[5] *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

[6] The district court incorrectly stated that no discrimination or denial of equal protection was alleged in this case. In paragraphs eight and nine of his original complaint, the plaintiff alleged equal protection violations. That the district court incorrectly believed no equal protection violation was alleged makes no difference to our decision. For purposes of our opinion, we assume the absence of any equal protection claim by plaintiff.

Absolute Legislative Immunity for the Mayor?

In *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), the Supreme Court recognized absolute immunity from suit under 42 U.S.C. § 1983 for state legislators.[7] *See also, Dombrowski v. Eastland*, 387 U.S. 82, 87 S.Ct. 1425, 18 L.Ed. 2d 577 (1967). This absolute immunity from suit under § 1983 was extended to regional legislators in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979). Although not addressing the question of "[w]hether individuals performing legislative functions at the purely local level, as opposed to the regional level, should be afforded absolute immunity from federal damage claims . . .," *id.* at 404, 99 S.Ct. at 1179, the logical implication of the Court's opinion in *Lake Country Estates* is that the reasoning for clothing federal, state and regional legislators with absolute immunity is equally applicable to affording local legislators with such immunity. *Id.* at 406-09, 99 S.Ct. at 1180-81 (Marshall, J., dissenting);[8] *Owen v. City of Independence*, Mo., 445 U.S. 622, 663 n.6, 100 S.Ct. 1398, 1422, n.6, 63 L.Ed.2d 673 (1980) (Powell, J., dissenting).

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[7] The Court reasoned that by enacting § 1983, Congress did not mean to abrogate the historical tradition of legislative immunity observed in England and the American Colonies and preserved in the formation of state and national governments here. 341 U.S. at 375-76, 71 S.Ct. at 787-88.

[8] In his dissent, Justice Marshall comments that

> "the majority's reasoning in this case leaves little room to argue that municipal legislators stand on a different footing than their regional counterparts. Surely the Court's supposition that the 'cost and inconvenience and distractions of a trial' will impede officials in the 'uninhibited discharge of their legislative duty' . . . applies with equal force whether the officials occupy local or regional positions."

440 U.S. at 408, 99 S.Ct. at 1181.

Three courts of appeals, including this circuit by dictum, have interpreted the reasoning of *Lake County Estates* to compel an extension of absolute immunity under § 1983 to local legislators. *Rheuark v. Shaw*, 628 F.2d 297, 304 n.12 (5th Cir. 1980); *Bruce v. Riddle*, 631 F.2d 272 (4th Cir. 1980); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 611-14 (8th Cir. 1980). Moreover, in *Universal Amusement Co., Inc. v. Hofheinz*, 616 F.2d 202, 205 (5th Cir. 1980), this court held, without discussing the *Lake Country Estates* decision, that city council members possessed absolute legislative immunity from liability under § 1983 for conduct in the furtherance of their legislative duties.

However, the panel in *Universal Amusement Co. v. Hofheinz* did not cite or discuss *Crowe v. Lucas*, 595 F.2d 985, 990 (5th Cir. 1979), in which a panel of this court held that local legislators possessed qualified immunity under § 1983, instead of absolute immunity, when acting in a legislative capacity.[9] "As a panel of this Court, we are without power to

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[9] In *Crowe v. Lucas*, this court accorded qualified, as opposed to absolute, immunity under § 1983 to a defendant who "wore two hats," that of a municipal judge and that of a city alderman. The panel in *Crowe v. Lucas* concluded the jury could reasonably have found that the defendant's actions in conspiring against the plaintiff and in ordering his arrest at a meeting of the board of aldermen were taken as an alderman rather than as a judge. The panel's reasoning was that "[m]aintaining order at a Board of Aldermen's meeting is normally a function performed by an Alderman rather than a Municipal Judge." 595 F.2d at 990. Although *Crowe v. Lucas* was decided nearly three months after the decision in *Lake Country Estates* was handed down, no mention of *Lake Country Estates* was made in the *Crowe* opinion.

After recognizing the Supreme Court has never decided whether the immunity accorded to officials in the positions of mayor and alderman is an absolute or "qualified" immunity, the panel in *Crowe v. Lucas* expressly rejected the defendant's argument that it should rule in favor of absolute immunity. The defendants had argued the application of absolute immunity, citing *Tenney v. Brandhove*, *supra*, which accorded absolute immunity to state legislators. The panel

(Footnote continued on next page.)

overrule a decision of another panel. That task falls solely to the full Court sitting *en banc." Ford v. United States,* 618 F.2d 357, 361 (5th Cir. 1980). Moreover, the panel in *Universal Amusement Co. v. Hofheinz* was also without power "to disregard the precedent set by a prior panel [in *Crowe*], even though it conceives error in the precedent," *Davis v. Estelle,* 529 F.2d 437, 441 (5th Cir. 1976), absent some intervening contrary authority from the Supreme Court or the *en banc* court. *See Robinson v. Parsons,* 560 F.2d 720, 721 n.2 (1977). However, we conclude that sufficient contrary authority from the Supreme Court has intervened since the decision in *Crowe v. Lucas,* thus enabling us to disregard that precedent.[10]

(Footnote continued from previous page.)

reasoned that since the Supreme Court, through language in *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658, 701, 98 S.Ct. 2018, 2041, 56 L.Ed.2d 611 (1978), had implied that municipalities might possess some immunity under § 1983, but not absolute immunity, it would not accord absolute immunity to municipal legislators because "[i]t would be anomalous to establish a greater degree of immunity for municipal officials than is given to the city itself." *Crowe v. Lucas,* 595 F.2d at 989.

The Supreme Court's language in *Monell,* from which the panel in *Crowe* inferred that muncipalities possessed some degree of immunity, is as follows:

> "Since the question whether local government bodies should be afforded some form of official immunity was not presented as a question to be decided on this petition and was not briefed by the parties nor addressed by the Courts below, we express no views on the scope of any municipal immunity beyond holding that municipal bodies sued under § 1983 cannot be entitled to an absolute immunity, lest our decision that such bodies are subject to suit under § 1983 'be drained of meaning.' *Scheuer v. Rhodes,* 416 U.S. 232, 248, 94 S.Ct. 1683, 1692, 40 L.Ed. 90 (1974)."

436 U.S. at 701, 98 S.Ct. at 2041, *quoted in Crowe v. Lucas,* 595 F.2d at 989.

[10] Moreover, as the *Crowe* opinion later clarifies, the defendant in question really was not "wearing two hats." Instead, he legitimately wore only the hat of a municipal judge because a state court had

(Footnote continued on next page.)

We hold, in agreement with at least five of the Justices of the Supreme Court, *see Owen v. City of Independence*, 445 U.S. at 663 n.6, 100 S.Ct. at 1422 n.6 (Powell, J., dissenting, joined by Burger, C.J., Stewart & Rehnquist, J.J.); *Lake Country Estates*, 440 U.S. at 406-09, 99 S.Ct. at 1180-81 (Marshall, J., dissenting), that local legislators are entitled to absolute immunity from suit under § 1983 for conduct in the furtherance of their duties. In so holding, we also note that the *Crowe* panel's rationale for the decision not to accord a city alderman absolute immunity does not survive the holding and reasoning of *Owen v. City of Independence*, 445 U.S. at 650-53, 100 S.Ct. at 1415-16 (rejecting the contention that a municipality enjoyed qualified immunity for its unconstitutional acts in discharging an employee, while recognizing that most government officials enjoyed such immunity).

Having decided that local legislators are entitled to absolute immunity from federal damage claims for conduct while acting in a legislative capacity, we now turn to the specific question raised here, that is, whether in this case the mayor of the City of Lafayette is entitled to absolute legislative immunity.

Although the mayor of the City of Lafayette is the elected chief executive officer of the city, he is entitled to absolute immunity from suit for acts taken in a legislative capacity. *See*

(Footnote continued from previous page.)

previously issued an order voiding the results of the election in which the defendant had defeated the plaintiff for the office of city alderman, and under state law the plaintiff was entitled to serve as an alderman until another election could be held. 595 F.2d at 993. Hence, under a narrow reading, *Crowe v. Lucas* simply held that a municipal judge acting without authority in the capacity of a local legislator, and thus not performing a judicial function, was entitled to only a qualified immunity.

The panel, however, did recognize that if the defendant had been acting in a judicial capacity, he would have been entitled to absolute immunity from suit, unless such judicial acts were done in "clear absence of all jurisdiction." 595 F.2d at 989.

Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719, 731-34, 100 S.Ct. 1967, 1974-75, 64 L.Ed.2d 641 (1980).[11] We conclude that when the mayor of a municipality vetoes an ordinance passed by the city's legislative body, he performs a legislative function and is entitled to absolute immunity from a civil suit complaining about actions taken in his legislative capacity. *Cf. Buckley v. Valeo*, 424 U.S. 1, 121, 96 S.Ct. 612, 683, 46 L.Ed.2d 659 (1976) (observing that by no means does the Constitution contemplate a total separation of powers between the three branches of government since "[t]he President is a participant in the law-making process by virtue of his authority to veto bills enacted by Congress"); *Edwards v. United States*, 286 U.S. 482, 490, 52 S.Ct. 627, 630, 76 L.Ed. 1239 (1932) (noting "the legislative character of the President's function in approving or disapproving bills" and that "[t]he President acts legislatively under the Constitution, [although] he is not a constituent part of the Congress"); *Smiley v. Holm*, 285 U.S. 335, 373, 52 S.Ct. 397, 401, 76 L.Ed. 795 (1932) (recognizing the legislative character of a governor's participation in a state's law-making process through his veto power); *La Abra Silver Mining Company v. United States*, 175 U.S. 423, 453, 20 S.Ct. 168, 178, 44 L.Ed. 223 (1899) (commenting that the Constitution authorizes "the President to perform certain functions of a limited number that are legislative in their general nature . . .").

The mayor's veto, like the veto of the President or a state governor, is undeniably a part of the legislative process. It

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[11] In *Supreme Court of Virginia v. Consumers Union*, the United States Supreme Court held that the Virginia Supreme Court and the justices thereof were entitled to absolute legislative immunity from suit in connection with the court's promulgation of disciplinary rules for attorneys which comprised the State's Bar Code. The Supreme Court reasoned that since the Virginia court exercised the State's entire legislative power with respect to regulating attorneys' conduct, the members of that court were the State's legislators for the purpose of issuing the Bar Code, and, therefore, that the Virginia court and its members were immune from suit when acting in their legislative capacity. 446 U.S. at 733, 100 S.Ct. at 1975.

differs only in that it takes place on the local level. When the mayor exercises his veto power, it constitutes the policy-making decision of an individual elected official. It is as much an exercise of legislative decision-making as is the vote of a member of Congress, a state legislator, or a city councilman. We, therefore, hold that the district court properly dismissed plaintiff's action against the mayor because the mayor was absolutely immune from suit in connection with his vetoes of the ordinances to rezone plaintiff's land.[12]

Absolute Legislative Immunity From Damages for the City Itself?

Approximately five months before *Owen v. City of Independence*, Mo., 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), was decided by the Supreme Court, the district court in this case, while recognizing that after *Monell* a municipality is not absolutely immune from a § 1983 action, held that the City of Lafayette was immune from the plaintiff's § 1983 suit.[13] In

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[12] On motion for new trial, the plaintiff argued that although the mayor might possess absolute immunity in connection with his vetoes, he would only be entitled to qualified immunity with respect to his other conduct complained about in the pleadings. We conclude the district court properly overruled the motion for new trial on the ground that the mayor's vetoes were the culmination of all of plaintiff's complaints. This is so because the mayor's other actions, aside from the vetoes of the rezoning ordinances, could not have resulted in a denial of any reasonable use of plaintiff's property and thus constituted an unconstitutional taking without just compensation.

[13] The district court stated:

"Thus, it is clear that the City of Lafayette, when exercising its legislative functions, is not absolutely immune from a 1983 action. It is not clear, however, that the city should have no immunity whatsoever. I do not here attempt to define the scope of the limited immunity which does exist. I do conclude that where, as here, the deprivation claimed is the result of a) a city's failure to act promptly rather than its affirmative enactment of an unconstitutional law or official policy and b) no discrimination or equal protection deprivation is asserted, the city is immune from suit under 42 U.S.C. § 1983."

support of the district court's decision rendering summary judgment in its favor, the City of Lafayette argues on appeal that it is entitled to an absolute legislative immunity from liability in damages—although not immunity from suit for prospective relief[14]—for actions taken by it in a legislative capacity.[15]

In *Owen v. City of Independence*, the Supreme Court held that a municipality was not entitled to a qualified immunity under § 1983 based on the good faith of its officials. Justice Brennan, writing for the majority, summarized the Court's decision in *Owen* as follows:

> "In sum, our decision *holding that municipalities have no immunity from damages liability flowing from their constitutional violations* harmonizes well with developments in the common law and our own pronouncements on official immunities under § 1983. . . .
>
> "We believe that today's decision, together with prior precedents in this area, properly allocates these costs among the three principals in the scenario of the § 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; *and the public, as represented by the municipal entity.* The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole.[16] And the public will be forced to bear only the costs of injury inflicted by the 'execution of a government's policy or custom, whether *made by its lawmakers* or by those whose

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[14] In this § 1983 action, the plaintiff has not sought injunctive or declaratory relief; instead, he seeks only damages to compensate him for an unconstitutional deprivation of property.

[15] Zoning is a legislative function of government. *South Gwinnett Venture v. Pruitt*, 491 F.2d 5, 6 (5th Cir.), *cert. denied*, 416 U.S. 901, 94 S.Ct. 1625, 40 L.Ed.2d 119 (1974).

[16] In our case, the offending officials are protected by absolute legislative immunity.

> edicts or acts may fairly be said to represent official policy.' *Monell v. New York City Dept. of Social Services*, 436 U.S., at 694, 98 S.Ct. at 2038."

445 U.S. at 655-59, 100 S.Ct. at 1418-19 (emphasis added).

The Supreme Court in *Owen* reasoned that the concerns that justified its previous decisions conferring immunities under § 1983 on various governmental officials "are less compelling, if not wholly inapplicable, when the liability of the municipal entity is at issue." 445 U.S. at 651, 100 S.Ct. at 1416. In a footnote to that statement, the Court commented that its decision in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979), "also [had] recognized that the justifications for immunizing officials from personal liability have little force when suit is brought against the governmental entity itself." *Owen*, 445 U.S. at 651-55 n.37, 100 S.Ct. at 1416-17 n.37.

In *Lake Country Estates*, the plaintiffs had brought a § 1983 suit against the members of the Tahoe Regional Planning Agency (TRPA), alleging that the regional planning agency had adopted a land use ordinance, which destroyed the economic value of their land, and thereby had "taken their property without due process of law and without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution . . . ." 440 U.S. at 394, 99 S.Ct. at 1174. The plaintiffs sought both money damages and injunctive relief. However, their complaint did not name the Tahoe Regional Planning Agency, the governmental entity, as a party-defendant. Although holding that to the extent the members of TRPA "were acting in a capacity comparable to that of members of a state legislature, they are entitled to absolute immunity from federal damages liability," 440 U.S. at 406, 99 S.Ct. at 1180, the Court cautioned that if the members of the planning agency "have enacted unconstitutional legislation, there is no reason why relief against TRPA itself should not adequately vindicate [plaintiffs'] interests." 440 U.S. at 404 n.29, 99 S.Ct. at 1179 n.29.

We consider the Supreme Court's decision in *Owen* and its caveat in *Lake Country Estates* to be dispositive of the city's argument and hold that the City of Lafayette is not entitled to a legislative immunity from damages under § 1983 in connection with its zoning regulations. Our decision is buttressed by language in *Owen* which squarely rejects the argument the city asserts here. There, in reviewing the history of municipal immunity from tort liability, the Court wrote:

> "To be sure, there were two doctrines that afforded municipal corporations some measure of protection from tort liability. The first sought to distinguish between a municipality's 'governmental' and 'proprietary' functions; as to the former, the city was held immune, whereas in its exercise of the latter, the city was held to the same standards of liability as any private corporation. The second doctrine immunized a municipality for its 'discretionary' or '*legislative*' *activities*, but not for those which were 'ministerial' in nature. *A brief examination of the application and the rationale underlying each of these doctrines demonstrates that Congress could not have intended them to limit a municipality's liability under § 1983.*"

Owen, 445 U.S. at 644, 100 S.Ct. at 1412 (emphasis added).

The city, however, attempts to distinguish *Owen* from the case before us and suggests that we should not extend *Owen* beyond its factual setting. The city asserts that "*Owen* was, as was *Monell* . . . , an employment case where a wrongfully terminated employee sought back pay as damages from a municipal employer. As such, *Owen* is factually distinguishable from this case wherein Mr. Hernandez complains that zoning legislation of the City of Lafayette is unconstitutional." Furthermore, the city argues that "[t]he immunity at issue in *Owen* was the qualified or limited 'good faith' immunity which attaches to the acts of executive, administrative and managerial officials, while the [district court in the present case] invoked an absolute *legislative* immunity from damages (not suit) for acts taken in a legislative capacity."

The city misperceives the circumstances of the *Owen* case. *Owen* was not merely an employment case; it involved the termination of a high ranking city official—the city police chief. Moreover, the alleged constitutional violation giving rise to a § 1983 cause of action was not the police chief's termination, since he had no property interest in that office under state law, but rather the city council's false public accusations, which had blackened his reputation, thus depriving him of a liberty interest without due process of law. 445 U.S. at 630-34, 100 S.Ct. at 1405-06.

In *Owen*, a city councilman had obtained a copy of an unpublished investigative report regarding the police chief's administration of the police property room. At a regularly scheduled meeting of the city council, this councilman made a statement concerning the investigation. In his statement, the councilman made several allegations of misconduct and possible illegal activity on the part of the police chief. Thereafter, the city council passed a motion to release the investigative report to the news media and to turn over the information to the local prosecuting attorney for presentation to the grand jury. In the motion, the city council also directed the city manager to take appropriate action against all persons involved in the misconduct. 445 U.S. at 626-29, 100 S.Ct. at 1403-04.

Therefore, the constitutional violation about which the plaintiff in *Owen* could legally complain was caused by the members of the city council while performing a legitimate legislative function, *i.e.* conducting an investigation, which is an established part of representative government. *See Tenney v. Brandhove*, 341 U.S. at 377-78, 71 S.Ct. at 788-89 (in which the Court recognized that state legislators, who were part of a committee that allegedly "smeared" plaintiff during an investigation, were acting in a legislative capacity in connection with the investigation and were entitled to absolute immunity under § 1983). In view of the Supreme Court's rejection in *Owen* of a municipality's claim of qualified immunity under § 1983 for a constitutional violation occasioned by the members

of its city council while acting in a legislative capacity, the City of Lafayette's argument here, *i.e.* that it is entitled to absolute legislative immunity from damages for its legislative acts, melts away.

Moreover, a finding concerning the existence of § 1983 immunity must be "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler v. Patchman*, 424 U.S. 409, 421, 96 S.Ct. 984, 990, 47 L.Ed.2d 128 (1976), *quoted in Owen* v. *City of Independence*, 445 U.S. at 638, 100 S.Ct. at 1409. In *Owen* the Court stated:

> "Where the immunity claimed by the defendant was well established at common law at the time § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity. *But there is no tradition of immunity for municipal corporations*, and neither history nor policy support a construction of § 1983 that would justify the qualified immunity accorded the city of Independence by the Court of Appeals."

445 U.S. at 638, 100 S.Ct. at 1409 (emphasis added).

In this case, the plaintiff has alleged that the city's R1-A zoning classification of his property has denied him any reasonable, economically viable use of his land, and, therefore, constituted a taking without just compensation in violation of the Fifth and Fourteenth Amendments. The summary judgment evidence, viewed "in the light most favorable to the nonmovant plaintiff," *Lee v. National Life Assurance Co.*, 532 F.2d 524, 529 (5th Cir. 1980), supports the plaintiff's contention that the R1-A zoning classification denied him any reasonable, economically viable use of his property.[17] It is well established that the application of a general zoning law to particular

[17] The evidence when viewed in the light most favorably to the plaintiff shows that the Hernandez property was not suited for an economically viable development under its present zoning classifica-

(Footnote continued on next page.)

property will effect a "taking" of that property under the just compensation clause of the Fifth Amendment[18] if the ordinance denies the owner an economically viable use of his land. *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 138 n.36, 98 S.Ct. 2646, 2666 n.36, 57 L.Ed.2d 631 (1978); *accord, Maher v. City of New Orleans*, 516 F.2d 1051, 1065 (5th Cir. 1975), *cert. denied*, 426 U.S. 905, 96 S.Ct. 2225, 48 L.Ed.2d 830 (1976); *Trustees Under the Will of Pomeroy v. Town of Westlake*, 357 So.2d 1299, 1304 (La.App.1978). Since this court is unaware of any well-established tradition of municipal immunity from damages to compensate for uncompensated takings,[19] we cannot read into

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(*Footnote continued from previous page.*)

tion (single family dwellings). This is so because it was bordered by a sewage treatment plant, the Coulee Mine flood plain extended on portions of the land, various easements limited the size and placement of residences on the proposed lots, and the irregular shape of the property limited the number of lots that could be created.

[18] The just compensation clause of the Fifth Amendment was made applicable to the states through the Fourteenth Amendment in *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 236, 17 S.Ct. 581, 584, 41 L.Ed. 979 (1897). The clause provides: "... nor shall private property be taken for public use, without just compensation." U.S.Const. Amend. V.

[19] For example, we note that under Louisiana law there is no immunity for the state and its political subdivisions from damages for an uncompensated "taking." *See, e. g., Boothe v. Department of Public Works*, 370 So.2d 1282, 1284 (La.App. 1979) (in which the court upheld a damage award for governmental "appropriation" of private property, *i. e.* the taking of private property by a public body without the proper exercise of eminent domain); *Arkansas Louisiana Gas Co. v. City of Minden*, 341 So.2d 607, 610 (La.App.1977) (holding that the city, by requiring plaintiff's pipelines to be lowered after the city had increased the depth and width of a stream that traversed them, had exercised its power of eminent domain through a police power regulation and must compensate the plaintiff for the reasonable cost of lowering the pipelines); *Benard v. State*, 127 So.2d 774, 778 (La.App. 1961) (holding that an action for "appropriation" of private property,

(*Footnote continued on next page.*)

§ 1983 an absolute immunity from damages for the City of Lafayette arising from its zoning regulations that result in the "taking" of private property for public use without just compensation.[20]

The legislative history of § 1983 also contradicts a grant of absolute immunity from damages to a municipality for any uncompensated "taking" of private property for public use, occurring as a result of zoning regulations that deny property owners any economically viable use of their land. As noted by the Supreme Court in *Monell*, Representative Bingham,[21] in discussing § 1 of the bill that eventually became the Civil Rights Act of 1871—now codified as 42 U.S.C. § 1983—explained "that he had drafted § 1 of the Fourteenth Amendment with

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(Footnote continued from previous page.)

i. e. the taking of property without compensation, may be maintained against the state, without the necessity of consent by the legislature): *Pelt v. Louisiana State Live Stock Sanitary Board*, 178 So. 644, 647 (La.App.1938) (holding that, since the Louisiana constitutional provision preventing the taking of private property for public purposes without adequate compensation is self-executing, "an agency or political sub-division of the State which has taken or damaged private property for public purposes without paying adequate compensation may be sued therefore, irrespective of the existence or non-existence of legislative authorization for the suit").

[20] Our refusal to bestow an absolute immunity from damages on the city for its uncompensated takings that result from the application of its zoning ordinances, the effect of which is to deny certain property owners any economically viable use of their land, is reinforced by the Supreme Court's discussion of the general rules governing a municipality's tort liability in damages in *Owen*. There, the Court wrote: "Under this general theory of liability, a municipality was deemed responsible for any private losses generated through a wide variety of its operations and functions, from personal injuries due to its defective sewers, thoroughfares, and public utilities, to property damage caused to its trespasses and *uncompensated takings*." *Owen*, 445 U.S. at 640, 100 S.Ct. at 1410 (emphasis added).

[21] Representative Bingham was the author of § 1 of the fourteenth amendment. *See Monell*, 436 U.S. at 685 n.45, 98 S.Ct. at 2033 n.45.

the case of *Barron v Mayor of Baltimore*, 7 Pet. 243, 8 L.Ed. 672 (1833), especially in mind. 'In [that] case the *city* had taken private property for a public use, without compensation . . ., and there was no redress for the wrong . . . .'" 436 U.S. at 686-87, 98 S.Ct. at 2033-34 (quoting Cong. Globe App., 42d Cong., 1st Sess. 84 (1871)) (emphasis, omissions and brackets in original).

After commenting that Representative Bingham's remarks had clearly disclosed his view that such takings by cities, as had occurred in *Barron*, would be redressable under § 1983,[22] the Court stated:

> "More generally, and as Bingham's remarks confirm, § 1 of the bill [§ 1983] *would logically be the vehicle by which Congress provided redress for takings, since that section provided the only civil remedy for Fourteenth Amendment violations and that Amendment unequivocally prohibited uncompensated takings.* Given this purpose, it beggars reason to suppose that Congress would have exempted municipalities from suit, insisting instead that *compensation* for a taking come from an officer in his individual capacity rather than from the government unit that had the benefit of the property taken."

Monell, 436 U.S. at 687, 98 S.Ct. at 2034 (emphasis added) (footnotes omitted). After making the foregoing statement, the Court noted that "[i]ndeed the federal courts found no obstacle to awards of damages against municipalities for common-law takings. *See Sumner v. Philadelphia*, 23 F.Cas. 392 (No. 13,611) (CC ED Pa.1873) (awarding damages of $2,273.36 and costs of $346.35 against the city of Philadelphia)." *Monell*, 436 U.S. at 687 n.47, 98 S.Ct. at 2034 n.47.

Finally, we are reassured in the correctness of our decision here—*i. e.* to deny the city immunity from a damage remedy for its uncompensated takings of private property through a

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[22] *See* Cong. Globe App., 42d Cong., 1st Sess. 85 (1871) (remarks of Rep. Bingham), *quoted in Monell*, 436 U.S. at 685 n.45, 98 S.Ct. at 2033 n.45.

zoning law that denies the owner of certain property any economically viable use thereof—by Justice Brennan's most recent writing on this subject in *San Diego Gas & Electric Co. v. City of San Diego*, ____ U.S. ____, ____, 101 S.Ct. 1287, 1295, 67 L.Ed.2d ____ (1981) (Brennan, J., dissenting).

In *San Diego Gas & Electric*, the city down-zoned some of plaintiff's property from industrial to agricultural and also designated some 233 acres of plaintiff's land as open space.[23] The plaintiff filed suit in state court alleging a "taking" of its property by "inverse condemnation"[24] and sought compensation. The trial court found a taking without just compensation, and the intermediate appellate court affirmed, hold-

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[23] Pursuant to the "open space" designation, the city "prepared a report mapping appellant's property for purchase by the city for open space use, contingent on passage of a bond issue." *San Diego Gas & Electric*, ____ U.S. at ____, 101 S.Ct. at 1295.

[24] For a good definitional discussion of inverse condemnation, *see United States v. Clarke*, 445 U.S. 253, 257, 100 S.Ct. 1127, 1130, 63 L.Ed.2d 373 (1980) (per Rehnquist, J.). In *Clarke*, the Court wrote:

> "The phrase 'inverse condemnation' appears to be one that was coined simply as a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted. 'Inverse condemnation is "*a cause of action against a governmental defendant* to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." ' ... A landowner is entitled to bring such an action as a result of 'the self-executing character of the constitutional provision with respect to compensation ...' ... A condemnation proceeding, by contrast, typically involves an action by the condemnor to effect a taking and acquire title. The phrase 'inverse condemnation,' as a common understanding of that phrase would suggest, simply describes an action that is the 'inverse' or 'reverse' of a condemnation proceeding."

Id. (emphasis in original) (citations omitted).

ing "there was 'substantial evidence to support the court's conclusion [that] there was inverse condemnation.'" *San Diego Gas & Electric*, ___ U.S. at ___, 101 S.Ct. at 1295 (citation omitted) (brackets in original).

The California Supreme Court, however, remanded the case for reconsideration in light of *Agins v. City of Tiburon*, 24 Cal.3d 266, 157 Cal.Rptr. 352, 598 P.2d 25 (1979), *aff'd on other grounds*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), which held that a land owner may not sue in inverse condemnation for compensation and that his sole remedies for such a taking are mandamus and declaratory relief. On remand, the intermediate appellate court reversed the trial court, holding that, unlike a person whose property is taken in eminent domain, one who is deprived of property through the exercise of a municipality's zoning power is not entitled to compensation.

The United States Supreme Court dismissed the appeal for lack of a final judgment because, although the California appellate court "has decided that monetary compensation is not an appropriate remedy for any taking of appellant's property that may have occurred, . . . it has not decided whether any other remedy is available because it has not decided whether any taking has in fact occurred." ___ U.S. at ___, 101 S.Ct. at 1294. Justice Brennan disagreed with the majority, concluding that the California appellate court's judgment was final because in his view it held as a matter of law on remand that there was no "taking." He and three other Justices[25] dissented from the dismissal and reached the merits.

In discussing the merits, Justice Brennan first opined in accordance with *Agins v. City of Tiburon*, 447 U.S. at 260, 100 S.Ct. at 2141, and Penn Central Transportation Co., *v. City of New York*, 438 U.S. at 138 n.36, 98 S.Ct. at 2666 n.36, that property may be "taken for public use" within the meaning of the just compensation clause by police power regulations such

[25] Justice Brennan was joined by Justices Stewart, Marshall, and Powell.

as zoning ordinances and other land use restrictions. ___ U.S. at ___, 101 S.Ct. at 1303. Then turning to the primary issue of the case, Justice Brennan, the author of the Court's opinions in *Monnell* and *Owen*, concluded that "once a court finds that a police power regulation has effected a 'taking,' the government entity must pay just compensation for the period commencing on the date the regulation first effected the 'taking' and ending on the date the government entity chooses to rescind or otherwise amend the regulation." *Id.* ___ U.S. at ___, 101 S.Ct. at 1307.

Although *San Diego Gas & Electric* was a suit under state law, which was appealed to the Supreme Court, as were *Agins* and *Penn Central Transportation Co.*, Justice Brennan's reasoning therein is applicable with equal force to the § 1983 case before us. Section 1983 provides that "every person," including a municipality, *see Monell*, 436 U.S. at 700-01, 98 S.Ct. at 2040-41, "who under color of any . . . ordinance . . . subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights . . . secured by the Constitution . . ., shall be liable to the party injured in an action at law . . ." 42 U.S.C. § 1983. Since the just compensation clause applies to the states through the due process clause of the fourteenth amendment, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, ___ U.S. ___, ___, 101 S.Ct. 446, 450, 66 L.Ed.2d 358 (1980); *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 239, 17 S.Ct. 581, 585, 41 L.Ed.2d 979 (1897), an action for damages will lie under § 1983 in favor of any person whose property is taken for public use without just compensation by a municipality *through a zoning regulation that denies the owner any economically viable use thereof.* The *measure of damages in such a case will be an amount equal to just compensation for the value of the property during the period of the taking.*[26]

[26] If a police power zoning regulation is not enacted in furtherance of the public health, safety, morals, or general welfare, there

(Footnote continued on next page.)

Conclusion

Based on the foregoing, and since there are genuine issues of material fact as to whether the R1-A zoning classification denied plaintiff any viable economic use of his property, we hold that rendition of summary judgment in the city's favor was improper and that the plaintiff is entitled to pursue his claim for damages in an amount equal to just compensation for the value of the property during the period of the "taking."

However, in cases such as the one before us, where the application of a general zoning ordinance to a particular person's property does not initially deny the owner an economically viable use of his land, but thereafter does come to result in such a denial due to changing circumstances, or where a zoning classification initially denies a property owner an economically viable use of his land, but the owner delays or fails to timely seek relief from such a classification,[27] we conclude that a "taking" does not occur until the municipality's governing body is given a realistic opportunity and reasonable time within which to review its zoning legislation vis-a-vis the particular property and to correct the inequity.[28]

(Footnote continued from previous page.)

may be no "public use." Although a municipality in such a case may not be compelled to pay just compensation under the Fifth Amendment because there has been no "taking for public use," the landowner whose property is thus "taken"—albeit not for "public use"—will nevertheless have a damage cause of action under § 1983 since such a "taking" would constitute the deprivation of property without due process of law under the Fourteenth Amendment. *See San Diego Gas & Electric,* ____ U.S. at ____, 101 S.Ct. at 1305 (Brennan, J., dissenting).

[27] This would be accomplished either by petitioning the city council or other appropriate body for a rezoning of the property that would allow the owner an economically viable use thereof, or by contesting the initial general zoning regulation prior to its passage.

[28] We believe that such a rule is consistent with the "weight of authority . . . that in order to constitute a taking, the condemnor must

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During the pendency of such proceedings to review and correct a zoning classification that denies an owner any economically viable use of his property, "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.' " *Agins v. City of Tiburon*, 447 U.S. at 262-63 n.9, 100 S.Ct. at 2142-43 n.9 (quoting *Danforth v. United States*, 308 U.S. 271, 285, 60 S.Ct. 231, 236, 84 L.Ed.2d 240 (1939)). *Accord, Thomas W. Garland, Inc. v. City of St. Louis*, 596 F.2d 784, 787 (8th Cir.), *cert. denied*, 444 U.S. 899, 100 S.Ct. 208, 62 L.Ed.2d 135 (1979); *Reservation Eleven Associates v. District of Columbia*, 420 F.2d 153, 157 (D.C. Cir. 1969).

The judgment of dismissal of the suit against the mayor is affirmed; the judgment in favor of the City of Lafayette is reversed, and the cause is remanded.

AFFIRMED in part, and REVERSED and REMANDED in part.

A true copy

Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ Joan Perkins
Joan Perkins

Deputy

9-18-81
New Orleans, Louisiana

(Footnote continued from previous page.)

have an intention to appropriate. . . ." *Porter v. United States*, 473 F.2d 1329, 1336 (5th Cir. 1973). *Accord, J. J. Henry Co. v. United States*, 411 F.2d 1246, 1249 (Ct.Cl.1969). The City of Lafayette under the circumstances of this case would lack an intention to deny plaintiff an economically viable use of his property until it was put on notice that its zoning regulations were effecting such a denial. *But see San Diego Gas & Electric Co. v. City of San Diego*, ____ U.S. at ____, 101 S.Ct. at 1303 (Brennan, J., dissenting).

James E. Hernandez,
Plaintiff-Appellant,

v.

City of Lafayette, et al.,
Defendants-Appellees.

No. 80-3160.

United States Court of Appeals,
Fifth Circuit.
Unit A

une 30, 1981.

Appeal from the United States District Court for the Western District of Louisiana.

ON PETITION FOR REHEARING

Before GOLDBERG, REAVLEY and TATE, Circuit Judges.

PER CURIAM:

On petition for rehearing, appellees bring to this court's attention that on April 16, 1981, the Louisiana Third Circuit Court of Appeals reversed the judgment of the state trial court referred to in our opinion in this case, *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1191 n.4 (5th Cir. 1981), and ordered that Mr. Hernandez' state court suit against the City of Lafayette be dismissed with prejudice. *Hernandez v. City of Lafayette*, ____ So.2d ____, No. 8098 (La.App., 3d Cir. Apr. 16, 1981).

The Louisiana appellate court held, *inter alia*, that the city's R1-A zoning classification of plaintiff's land did not deprive plaintiff of all practical use of his property and that, therefore, the city's denial of a change in zoning was not unreasonable, arbitrary or a denial of due process of law.

Appellees argue that further consideration of plaintiff's claims in federal court are barred either by res judicata or the related doctrine of collateral estoppel, citing *Allen v. McCurry*, ____ U.S. ____, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980) and *Jennings v. Caddo Parish School Board*, 531 F.2d 1331 (5th Cir. 1976).

We note that our decision in this case held only that, on the record before us, there were genuine issues of material fact as to whether the R1-A zoning classification of plaintiff's land denied him any viable economic use thereof and that it was, therefore, improper for the district court to render summary judgment in the city's favor. Res judicata is an affirmative defense, *see* Fed.R.Civ.P. 8(c), and must be pleaded in the trial court. Therefore, our prior opinion in this case should not be read to preclude assertion of the affirmative defenses of res judicata and collateral estoppel on remand to the district court. This statement should not, however, be read as an opinion by this court as to the legal validity of those defenses in this case.

Appellees also bring to our attention that we incorrectly stated that the ordinance which would have rezoned plaintiff's land to a B1-0 classification was "unanimously" passed by the city council.

IT IS ORDERED that the petition for rehearing is hereby DENIED.

A true copy

Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ Joan Perkins
Joan Perkins

Deputy

9-18-81
New Orleans, Louisiana

APPENDIX B

(1) Ruling of the United States District Court for the Western District of Louisiana, dated December 13, 1979.

(2) Judgment of the United States District Court for the Western District of Louisiana, dated December 13, 1979.

(3) Denial of Motion for New Trial by the United States District Court for the Western District of Louisiana, dated February 11, 1980.

UNITED STATES DISTRICT COURT

Western District of Louisiana

Lafayette-Opelousas Division

James E. Hernandez

vs.

The City of Lafayette et al

Civil Action No. 79-0303

RULING ON MOTION

Plaintiff, owner of a large tract of land in the City of Lafayette, filed this suit under 42 U.S.C. § 1983 against the city and its mayor, Kenneth J. Bowen, alleging that the city's handling of the zoning of his property has deprived him of his civil rights. Now before the court is defendants' motion for judgment on the pleadings, which has been converted to a motion for summary judgment by the plaintiff's filing of additional documentary evidence.[1]

The plaintiff's version of the facts can be summarized as follows:

1) Under its zoning authority, the City of Lafayette, more than 10 years ago, zoned the Hernandez property R1-A (single-family dwelling).

2) In 1975, plaintiff made his first request for a change in the zoning classification to permit construction of office buildings on the property. No final action was taken on that request but a later request for a change to allow the property to be used for multi-family residences was granted by the city council and vetoed by Mayor Bowen.

[1] These written reasons for ruling are intended to supplant the oral reasons for ruling made following hearing on this motion.

3) In early 1979, the city, through the councilmen and the mayor, informally assured plaintiff that the zoning restriction would be eased as part of an agreement settling a pending state court suit. When the agreement was reduced to writing and presented for final approval, Mayor Bowen withdrew his consent.

4) Plaintiff complains that the city announced plans to build a road which would bisect his property but the city repeatedly delayed any decision on beginning road construction. The mayor was motivated to deny the requested zoning changes, plaintiff alleges, by his desire to hold down the market value of the Hernandez property and thereby reduce the city's expropriation costs.

5) Plaintiff has made no claim that he was denied equal protection or that he was the victim of any discrimination.

Plaintiff contends that his property would have greater potential value with the zoning restriction eased, that failure to ease the restriction therefore amounts to a taking of his property without due process. Plaintiff does not dispute the city's authority to maintain its present zoning scheme. He asserts, however, that the delay in making decisions on the zoning and the proposed road as those decisions related to his property, the change of position by the city, and the city's objective of saving money on property needed for the road combine to give him a cause of action against the city and the mayor under 42 U.S.C. § 1983.

Zoning is a legislative function carried out by the city. *Four States Realty Co., Inc. v. City of Baton Rouge*, 309 So.2d 659 (La. 1975). When Mayor Bowen vetoed the pending zoning change, he was acting in a legislative capacity. Thus Mayor Bowen benefits from the absolute immunity granted to legislators and is not subject to suit under 42 U.S.C. § 1983 for this action. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, ____ U.S. ____, 59 L. Ed.2d 401, 99 S. Ct. 1171 (1979).

Plaintiff's claim against the City of Lafayette presents more complex issues. In *Monell v. N. Y. City Department of Social Services,* 436 U.S. 658 (1978), the Supreme Court held that local governing bodies could be sued directly under 42 U.S.C. § 1983 where some official policy of that body was responsible for a deprivation of rights protected by the Constitution. Although the Court held that a city is not *absolutely* immune from suit, it specifically refused to determine the extent of any limited immunity a city should enjoy. 436 U.S. at 701. In *Lake Country Estates,* the Court indicated that a legislative body, unlike individual legislators, did not, under all circumstances, have immunity from a 1983 action. (____ U.S. at ____, 59 L. Ed.2d at 413, 99 S. Ct. at 1179 n. 29). Again, no perimeters were drawn on the scope of the limited immunity such a body might have.

Thus, it is clear that the City of Lafayette, when exercising its legislative functions, is not absolutely immune from a 1983 action. It is not clear, however, that the city should have no immunity whatsoever. I do not here attempt to define the scope of the limited immunity which does exist. I do conclude that where, as here, the deprivation claimed is the result of a) a city's failure to act promptly rather than its affirmative enactment of an unconstitutional law or official policy and b) no discrimination or equal protection deprivation is asserted, the city is immune from suit under 42 U.S.C. § 1983.

Because Mayor Bowen and the City of Lafayette are immune from suit, the motion by defendants for summary judgment is granted.

Lafayette, Louisiana, this 13th day of December, 1979.

/s/ W. Eugene Davis
Judge, United States District Court

U.S. District Court
Western District of Louisiana
Filed December 17, 1979
Robert H. Shemwell, Clerk

UNITED STATES DISTRICT COURT

Western District of Louisiana

Lafayette-Opelousas Division

James E. Hernandez
vs.
The City of Lafayette et al

Civil Action No. 79-0303

JUDGMENT

For reasons assigned this date:

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff's action be and it is hereby dismissed at plaintiff's cost.

Lafayette, Louisiana, this 13th day of December, 1979.

/s/ W. Eugene Davis
Judge, United States District Court

U. S. District Court
Western District of Louisiana
Filed February 11, 1980
Robert H. Shemwell, Clerk

UNITED STATES DISTRICT COURT

Western District of Louisiana

Lafayette-Opelousas Division

James E. Hernandez
vs.
City of Lafayette et al

Civil Action No. 790303-D

RULING ON MOTION

The plaintiff has moved for new trial on several grounds, including the argument that only Mayor Bowen's veto of the zoning ordinance was addressed when summary judgment was granted. Apparently the plaintiff considers the specific reference to the veto on page 3 of the opinion to mean that the other factors listed on pages 1 and 2 were not taken into account. This view is a misinterpretation of the court's holding; I considered all the factors noted in the opinion. However, the veto was the culmination of all of plaintiff's complaints and it was properly central to the discussion of the immunity defense.

I have considered all other grounds raised by the plaintiff and adhere to my original position. Therefore, the motion for new trial is denied.

Lafayette, Louisiana, this 11th day of February, 1980.

/s/ W. Eugene Davis
Judge, United States District Court

APPENDIX C

(1) Judgment of the United States Court of Appeals for the Fifth Circuit, dated May 1, 1981

U. S. District Court
Western District of Louisiana
Filed August 20, 1981
Robert H. Shemwell, Clerk

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 80-3160

D. C. Docket No. CA 79 0303 D

JAMES E. HERNANDEZ,
Plaintiff-Appellant,

versus

CITY OF LAFAYETTE, ET. AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana

Before GOLDBERG, REAVLEY and TATE, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that City of Lafayette, defendant-appellee, pay to James E. Hernandez, plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

May 1, 1981

A true copy

Test: GILBERT F. GANUCHEAU
Clerk, U. S. Court of Appeals, Fifth Circuit

By /s/ Joan Perkins
Joan Perkins

Deputy

9-18-81
New Orleans, Louisiana

ISSUED AS MANDATE: August 19, 1981

APPENDIX D

(1) Constitutional Provisions

(2) Statutes

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides:

> "[N]or shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the Constitution of the United States provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATUTES

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(R.S. § 1979.)

Opposition

Office - Supreme Court, U.S.
FILED
DEC 18 1981
STEVAS
CLERK

NO. 81-605

In the Supreme Court of the United States

OCTOBER TERM, 1981

CITY OF LAFAYETTE,

Petitioner

versus

JAMES E. HERNANDEZ,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ONEBANE, DONOHOE, BERNARD, TORIAN, DIAZ, McNAMARA & ABELL

JOHN G. TORIAN, II
P. O. DRAWER 3507
LAFAYETTE, LA 70502

MICHAEL G. DURAND
P. O. DRAWER 3507
LAFAYETTE, LA 70502

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-8555

TABLE OF CONTENTS

	PAGES
TABLE OF AUTHORITIES	ii
ADDITIONAL STATEMENT OF THE CASE	1
ARGUMENT	
A. It Is Clear Under Established Federal Law That Regulation Which Amounts To A Taking Entitles An Aggrieved Landowner To Just Compensation In The Form Of A Monetary Remedy	3
B. A Substantial Body Of Law As Developed In The Varying State Courts Of The United States Have Recognized That Overregulation Of Property Through The Police Power Results In A Compensible Taking	8
C. There Was Not, Is Not, And Cannot Be An Immunity From Damages Under 42 USC 1983 For Municipalities Enacting And Enforcing Ordinances Which Violate Constitutional Rights	13
D. Policy Demands, Rather Than Prohibits, Accountability Of Municipalities For Violation Of Constitutional Rights	22
CONCLUSION	23

TABLE OF AUTHORITIES

CASES:	PAGES
Agins v. City of Tiburon, 477 U.S. 255, 260, 100 S.Ct. 2138, 65 L.Ed. 2d 106 (1980)	8, 10, 11
American Dredging Company v. State Department of Environmental Protection of New Jersey, 161 N.J. Super. 504, 391 A. 2d 1265 (1978) at pp. 266, 1267	11
Arastra Limited Partnership v. City of Palo Alto, 401 F. Supp. 962 (D.C.N.D. Cal. 1975)	8
Barron v. Mayor Baltimore, 7 Pet. 243, 8 L.Ed. 672 (1833)	18
Bauman v. Ross, 167 U.S. 548 (1897)	5
Bill Posting Sign Company v. Atlantic City, 7. N.J.L. 72, 58 A. 342 (1904)	5
Block v. Hirsch, 256 U.S. 135 (1921)	5
Brinkmeyer v. City of Evansville, 29 Ind. 187 (1867)	15
Bruce v. Riddle, 464 F.Supp. 745 (D.C.S.C. 1979) FRCP 54 (b)	20
Burrows v. City of Keene, 432 A. 2d 15 (N.H. 1981)	10

Chicago B&Q Railroad v. City of Chicago, 166 U.S. 266, 17 S.Ct. 581, 41 L.Ed. 979 (1897) .. 17

City of Austin v. Teague, 556 S.W. 2d 400, 404 (1977)..... 20

City of Oklahoma v. Hill, 6 Okla, 114, 50 P. 242 (1897)..... 15

City of Newport, et al v. Fact Concerts, Inc., ___ U.S. ____,49 USLW 4860 (June 26, 1981).... 20, 21

DeLuca v. Kahr Brothers, Inc., 171 N.J. Super. 100, 407 A. 2d 1285 (1979) 20

Dewey v. City of Detroit, 15 Mich. 307 (1867).. 15

Eck v. Bismark, 283 N.W. 2d 193 (N.D. 1979).. 9

Fasano v. Board of County Commissioners, 264 Or. 574, 507 P. 2d 23 (1973) 24

Fowle v. Common Council of Alexandria, 28 U.S. (3 Pet.) 398 (1830)..... 14

Fred F. French Investing v. City of New York, 39 N.Y. 2d, 587, 315 N.E. 2d 381, 385 N.Y.S. 2d 5 (1975) app. dism., 429 U.S. 990 (1976)... 6

Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed. 2d 130 (1962)..... 4, 8

Gorman Towers, Inc. v. Gogoslavasky, 626 F. 2d 607 (8th Cir., 1980), at p. 613 20

Griffin v. Mayor and Council of New York, 9 N.Y. 456 (Ct. App. 1853)..... 15

Hollaway v. City of Pipestone, 269 N.W. 2d 28 (Minn. 1978)..... 9

Hudson County Water Company v. McCarter, 209 U. S. 349 (1908)..... 5

Kelly v. City of Milwaukee, 18 Wisc. 83 (1864) . 15

Klopping v. City of Whittier, 104 Cal. Rpt. 1, 500 P 2d 1345 (1972) 11

Krahl v. Nine Mile Creek Watershed District, 283 N.W. 2d 530 (Minn. 1979)..... 11

Lom-Ran Corporation v. Department of Environmental Protection of the State of New Jersey, 163 N.J. Super. 376, 394 A. 2d 1233 (1978)..... 10

Lomarch v. Mayor and Common Council of the City of Englewood, 51 N.J. 108, 237 A. 2d 881 (1968)..... 10

London v. City of Seattle, 93 Wash. 2d 657, 611 P. 2d 781 (1980)..... 11

Martin v. District of Columbia, 205 Y.S. 135 (1907)..... 5

Mattoon v. City of Norman, 617 P. 2d 1347 (Okl. 1980) 11

Minch v. City of Fargo, 297 N.W. 2d 790 (N.D. 1980) 9, 11, 20

Monell v. New York City Department of Social Services, 436 U.S. 65, 98 S.Ct. 2018, __ L.Ed. 2d____(1978) 14, 16, 18, 19, 20

Nectow v. City of Cambridge, 277 U.S. 183, 48 S.Ct. 477, 72 L.Ed. 2d 842 (1928) 4

Ogg v. The City of Lansing, 35 Iowa 495 (1872) 14

Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 42, 62 L.Ed. 2d 28 (1980)..... 3, 12, 13. 16, 17, 20, 22, 23

Penn Central Transportation Company v. City of San Diego, ____ U.S. ____, 101 S.Ct. 1287 (1981)..... 8

Pennsylvania Coal Company v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922) . 4, 8, 10, 24

Pope v. City of Atlanta, 242 Ga. 331, 249 S.W. 2d 16 (1978) 10

Gary D. Reihart v. Township of Carol, 487 P. 2d 461, 409 A. 2d 1167 (1979) 10

Riley v. Town of Greenwood, 72 S.C. 90, 51 S.E. 532 (1905)..... 5

Robertson v. City of Salem, 191 Fed. Supp. 604 (D.C., Ore. 1961) 8

San Diego Gas and Electric Company v. City of San Diego, U S. __, 101 S.Ct. 1287 (1981) 7, 8, 13, 22

Sixth Camdem Corporation v. Evesham T.P., Burlington City, 420 F. Supp. 709 (D.C. N.J., 1976) 23

Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1872)..... 17

Smoot v. Mayor, etc., of Wetumpeka, 24 Ala. 112 (1854)..... 15

State v. Robb, 100 Me. 180, 60 A. 874 (1905)... 5, 6

Stockdale v. Rio Grand Western Railway Company, 28 Utah 201, 77 P. 849 (1904)..... 5

Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980)..... 19

T & M Holmes v. Township of Mansfield, 162 N.J. Super. 497, 393 A. 2d 613 (1978) 11, 20

Toso v. City of Santa Barbara, 101 Cal. App. 3rd 932, 161 Cal. Rpt. 210 (1980), cert denied, 49 USLW (1981)..... 11

Weightman v. The Corporation of Washington, 66 U.S. (1 Black) 39 (1862) 14

Western College of Homeopathic Medicine v. City of Cleveland, 12 Ohio St. 375 (1861).... 15

Wheeler v. City of Cincinnati, 19 Ohio St. (1869)..... 15

OTHER AUTHORITIES

Richard F. Babcock, "The Zoning Game", at p. 158 (1977) 24

Bauman, "Agins: Pulling Shut the Courthouse Door", 32 Land Use Law and Zoning Digest No. 3, at p. 3 (A.P.A. March, 1980) 12

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D. Hagman, "Temporary or Interim Damages Awards in Land Use Control Cases", (Part I) 6 Zoning and Planning Law Report, 129, (1981) 7

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Frederick A. Strom, ed., "1981 Zoning and Planning Law" 12

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

CITY OF LAFAYETTE,

Petitioner

versus

JAMES E. HERNANDEZ,

Respondent

OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

ADDITIONAL STATEMENT OF THE CASE

Petitioners' sterile statement of the case merits some additional comment by Respondent. The complaint below alleges that the City of Lafayette attempted to utilize it's zoning power to extract property rights for a proposed city improvement at a much cheaper price than the City would have to pay under any of the zoning

classifications which Mr. Hernandez had previously sought from the City. Respondent has alleged, and the record will show, that the sole justification for maintaining the existing zoning classification on the property was to avoid paying additional dollars when the property would be expropriated. As Councilman Benny Ritchey stated at a public hearing, "If we changed the zoning to another classification, we are going to have to pay more money when we create the right-of-way." (Record, at p. 427).

The long factual history charting the conduct of the City towards Mr. Hernandez has been set forth in detail in the original brief on behalf of James E. Hernandez, Plaintiff-Appellant to the Fifth Circuit Court of Appeal. Due to the inherent space limitation on this response, it is not possible to reiterate those facts here. It is sufficient for these purposes, however, to note that this case is not a pure "zoning" case. There is a consistent pattern of actions by the City to prevent Mr. Hernandez from obtaining a zoning change for his property which will allow for some reasonable development of his land. The documents which have been submitted to the District Court clearly show that the overriding concern of the City in denying Mr. Hernandez some use of his property was to extract from him certain rights-of-way across his property at either a cheaper price or, even better, for no price at all. Squarely stated, the issue before this Court is whether it is constitutionally permissable for a municipality to utilize it's police power to circumvent the clear requirements of the Fifth and Fourteenth Amendments for just compensation. Additionally, the question is raised as to whether or not an individual so harmed should be entitled to damages for such a violation of it's constitutional rights. Contrary to the assertions of the City, Respondents forcefully contend that

the City's repealing of the capital improvement project on advise from its counsel that it would lose the zoning lawsuit if it did not do so in no way alters the deprivation of the use of Mr. Hernandez' property which plaintiff has suffered through the years.

ARGUMENT

A. It Is Clear Under Established Federal Law That Regulation Which Amounts To A Taking Entitles An Aggrieved Landowner To Just Compensation In The Form Of A Monetary Remedy.

It is pertinent to point out that the issue before the Fifth Circuit Court of Appeal was whether or not the City of Lafayette possessed an absolute immunity from suit for unconstitutional uses of the zoning power. The City has indicated to this Court that the Fifth Circuit considered and somehow indiscriminately mixed together the question of whether an overly restrictive regulation constitutes a compensible government action with the concept of absolute legislative immunity. Because of the City's extensive treatment of that issue in its Petition to this Court, Respondents will deal with the City's contentions accordingly.

Frankly stated, the position of the City of Lafayette is that because it may have to pay for it's constitutional transgressions, that factor should preclude any awarding of compensation and/or damages against the City as a matter of public policy. However, as this Court has not hesitated to previously notice, such an argument cannot stand in the face of constitutional transgression. See, *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 42, 62 L.Ed. 2d 28 (1980); see also, D. Hagman, "Tem-

porary or Interim Damages Awards in Land Use Control Cases" (Part I) 6 *Zoning and Planning Law Report* 129, at p.133 (1981).[1]

It has long been recognized by this Court that over-regulation of property constitutes a taking under the Fifth and Fourteenth Amendments to the United States Constitution. *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed. 2d 130 (1962). The Constitution requires that the regulation must rationally promote a public objective and that, regardless of the benefits to be derived by the public from the land use regulation the property owner must not be denied a reasonable return on the properties subject to the regulation. *Nectow v. City of Cambridge*, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 2d 842, (1928).

The holding of this Court in *Pennsylvania Coal Company v. Mahon*, supra, was clearly expressed by Justice Holmes:

> The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. *Pennsylvania Coal v. Mahon*, supra, p. 160.

The City is in essence asking this Court to overrule an established line of jurisprudential precedent beginning with the landmark *Pennsylvania Coal* case. It is attempting to have this Court overrule that line of cases, sub

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1. "Whether the liabilities are staggering or not should not deter a Court from giving appropriate relief for constitutional violations. Staggering liabilities can only result if there are staggering losses imposed on private landowners."

silentio, by arguing to this Court that Justice Holmes really did not mean what he said when he said that over-regulation could constitute a taking. This argument advocating Justice Holmes' "carelessness" in the opinion is buttressed by a string of citations beginning with *Block v. Hirsch*, 256 U.S. 135 (1921). In fact, over fifteen cases are cited by the City to this Court, with the argument that "in not one of these cases is the term "taking" as applied to a regulatory action given the meaning ascribed to the term by the Fifth Circuit." See, Petition for Writ of Certiorari of the City of Lafayette, at pp. 12-13, fn. 6.

However, the City fails to mention to this Court that not one of the cases it has cited involve a landowner who was seeking damages as a remedy.[2]

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2. *Block v. Hirsch*, 256 U.S. 135 (1921) (Suit was to recover possession, not damages); *Martin v. District of Columbia*, 205 U.S. 135 (1907) (an assessment case after land had been taken for a street widening). *Hudson County Water Company v. McCarter*, 209 U.S. 349 (1908), (plaintiff sought injunction not damages); *Bauman v. Ross*, 167 U.S. 548 (1897), (involved an act which provided for compensation - one issue was the deduction of benefits from amounts of compensation due - no one sought money damages for unconstitutional legislation); *Bill Posting Sign Company v. Atlantic City*, 71 N.J.L. 72, 58 A. 342 (1904), (no damages sought - company sought to have a sign ordinance declared unconstitutional); *State v. Robb*, 100 Me. 180, 60A. 874 (1905), (Criminal prosecution for a violation of health statute - no damages could possibly have been involved); *Stockdale v. Rio Grand Western Railway Company*, 28 Utah 201, 77 P 849 (1904), (injunction sought by plaintiff, not damages. Curiously enough, the defendants in this case argued that injunction was not the proper remedy, but that the sole remedy was an action for damages. The Court noted that an injunction would lie in this case); *Riley v. Town of Greenwood*, 72 S.C. 90, 51 S.E. 532 (1905), (action was found to be purely in equity and for an injunction - Court specifically noted this was not an action for damages); in each of the cases cited by the City of Lafayette, there was not a damage remedy sought by the plaintiff.

Apparently, the City would have this Court believe that were damages a proper remedy for policy power regulations which constituted a taking, the Court in *State v. Robb*, 100 Me. 180, 60A 874 (1905) should not only have invalidated the ordinance and found the defendant not guilty, but should have awarded him compensatory damages as well. To attempt to use such logic to dilute the holding of the Fifth Circuit Court of Appeal in the instant case belies reason.

We would ask this Court to closely examine the holding of *Fred F. French Investing v. City of New York*, 39 N.Y. 2d, 587, 315 N.E. 2d 381, 385 N.Y.S. 2d 5 (1975), app. dism., 429 U.S. 990 (1976), an opinion heavily relied upon by the City of Lafayette herein. This case, while on its surface embracing the "metaphor" argument advocated by the City of Lafayette herein, clearly recognized the problems with such an absolute interpretation of its holding. That "window" was succinctly noted in subsequent literature:

> And in an interesting paragraph in *French*, which is (at least as perceived by the Court) a non-acquisitory regulation case, the Court states: "with respect to damages caused by the unlawful zoning amendment the issue is not properly before the Court. The owner . . . claims compensation for value appropriated as for an "inverse" taking in eminent domain . . . The City . . . seeks a declaration with respect to such damages, but in the absence of allegation or proof that such damages lie, are claimed, or how they have been incurred, there can be no abstract declaration, and therefore there is none." Thus to the New York Court of Appeals, there appears to be a window between inverse condemnation for a property interest and in-

> validation. *That window is damages for the unlawful regulation.*" D. Hagman, "Temporary or Interim Damages Awards in Land Use Control Cases" (Part I) 6 *Zoning and Planning Law Report* 129, at p. 132 (1981).

Additionally, although the City has stated that one of the questions presented to this Court is should compensation be due, when does the period of taking commence, it did not specifically address that question in its argument. Of course, the City is utilizing the presentation of the issue as an implied argument to the Court that financial responsibility to aggrieved landowners should, as a matter of public policy, not be the law.

However, the concept of "temporary damages" as reflected in Justice Brennan's dissent in *San Diego Gas and Electric Company v. City of San Diego*, __ U.S. __, 101 S.Ct. 1287 (1981) and in the Fifth Circuits' opinion in the instant case provide an adequate answer to the "parade of horribles" which the City argues to this Court such a rule would inflict:

> The *Hernandez* modification to the Brennan temporary damages rule should take away the worry of the "invalidation is the only remedy" school of thought that governments will be paralyzed into inaction if every overregulation subjects them to damage payments. D. Hagman, "Temporary or Interim Damage Awards in Land Use Control Cases" (Part I) 6 *Zoning and Planning Law Report* 129 (1981);

In short, to find that the City's exercise of its police power, however arbitrary or excessive, cannot stand as a matter of Federal Constitutional Law and constitute a

taking within the meaning of the Fifth Amendment flatly contradicts the clear and unmistakable precedents set by this Court in its previous decisions. *San Diego Gas and Electric v. City of San Diego,* supra, at p. 1301, (Brennan, J., dissenting); *Penn Central Transportation Company v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed. 2d 631 (1978); *Agins v. City of Tiburon,* 447 U.S. 255, 260 100 S.Ct. 2138, 2141, 65 L.Ed. 2d 106 (1980); *Goldblatt v. town of Hempstead,* supra, *Pennsylvania Coal Company v. Mahon,* supra. The position the City of Lafayette advocates herein is essentially that of Justice Brandeis in his dissent in the *Pennsylvania Coal* case.

By advocating that invalidation is the only remedy available to an aggrieved landowner under *any* circumstances, the City of Lafayette must argue that no taking can *ever* occur via regulation. If a taking does occur, compensation *must* be payable. Invalidation unaccompanied by payment of damages would hardly compensate the landowner for any economic loss suffered during the time his property was taken. *San Diego Gas and Electric,* supra, at p. 1305 (Brennan, J., dissenting.)

Additionally, attempts by municipalities to hold down property values through the use of the police power in anticipation of future expropriations have been consistently found by federal courts to violate the Fifth and Fourteenth Amendments to the United States Constitution. *Robertson v. City of Salem,* 191 Fed. Supp. 604 (D.C., Ore. 1961); *Arastra Limited Partnership v. City of Palo Alto,* 401 F.Supp. 962 (D.C. N.D. Cal. 1975).

B. A Substantial Body Of Law As Developed In The Varying State Courts Of The United

States Have Recognized That Overregulation Of Property Through The Police Power Results In A Compensible Taking.

We would respectfully submit that the body of law as developed in the State Courts does not present so stalwart a bulwark against the rationale of compensible takings as the City of Lafayette would lead this Court to believe. The City's citation of *Eck v. Bismark*, 283 N.W. 2d 193 (N.D. 1979) is curious at best. As pointed out by the Supreme Court of North Dakota in *Minch v. City of Fargo*, 297 N.W. 2d 790 (N.D. 1980), *Eck* stands merely for the propositions that a simple decrease in monetary value as a result of a zoning action does not necessarily amount to a taking. *Minch*, supra, at p. 790 (Citing *Eck*, supra at p. 197). "Only where the zoning ordinance 'forbids substantially all use of regulated property' will a suit in inverse condemnation be appropriate." (citing *Eck*, supra, at p. 201). *Minch*, supra, at p. 790.

Additionally, in *Hollaway v. City of Pipestone*, 269 N.W. 2d 28 (Minn. 1978), cited by the City of Lafayette on p. 15 of its Petition, the Court specifically declined to hold that no right of inverse condemnation existed where the statutory remedy of enjoining enforcement was available:

> It may be possible that a zoning ordinance can so interfere with an owner's use of his land as to constitute a taking thereof where inverse condemnation would lie. *Hollaway*, supra, at p. 31.[3]

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3. In fact, it would appear that a number of cases cited at pp. 14 and 15 of the Petition For Certiorari stand for somewhat less than the Ci-

In fact, contrary to the allegation of the City that it is "settled law" that a regulation does not effect a compensible taking, a substantial body of case law has developed in the state courts dictating a contrary result. Only recently, the Supreme Court of New Hampshire has flatly rejected the *Agins* analysis in holding that governmental regulations can and do require just compensation in a land use context. *Burrows v. City of Keene*, 432 A. 2d 15 (N.H. 1981).

In *Lom-Ran Corporation v. Department of Environmental Protection of the State of New Jersey*, 163 N.J. Super. 376, 394 A. 2d 1233 (1978), the Court was clear in finding that "excessive governmental regulation under the policy power may be so onerous as to constitute a taking which requires compensation. *Lom-Ran*, supra at p. 1238. In *Lomarch v. Mayor and Common Council of the City of Englewood*, 51 N.J. 108, 237 A. 2d 881 (1968), the Court stated that: " . . . . any attempt to deprive a landowner of the use of his property for one year would be unconstitutional absent in intent to compensate the landowner . . . whenever the legislature authorizes municipal acts and which, if taken, would require under the constitution that just compensation be paid, it follows that if the municipality wishes to exercise that power, it must comply with the constitutional mandate and pay. *Lomarch*, supra, at p. 884.

The Court proceeded to order the City to pay compensation to the landowner for a temporary taking of his

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ty of Lafayette would infer. *Gary D. Reihart v. Township of Carol*, 487 P. 2d 461, 409 A. 2d 1167 (1979) noted that there was no evidence of a defect or taking in the record. *Pope v. City of Atlanta*, 242 Ga. 331, 249 S.W 2d 16 (1978), cert denied, 440 U.S. 936 (1979) found the reliance on the *Pennsylvania Coal* case misplaced. The plaintiff in *Pope* could not come within the *Pennsylvania Coal* rationale because refusing to allow plaintiff to build a tennis court did not deprive her of all reasonable use of her property. *Pope*, supra, at pp. 20-21.

property and for the deprivation of use effected by the ordinance in question.[4]

Even California, in the face of the *Agins* decision, has recognized that the rule cannot be absolute. A plaintiff may still properly sue for damages in the State of California in inverse condemnation where he alleges and proves unreasonable precondemnation activities. *Toso v. City of Santa Barbara,* 101 Cal. App. 3rd 932, 161 Cal. Rpt. 210 (1980), cert. den., 49 USLW (1981); *Klopping v. City of Whittier,* 104 Cal. Rpt. 1, 500 P 2d 1345 (1972).

It would appear that in spite of the *Agins* decision, and contrary to the position taken by the City of Lafayette herein, under certain facts an aggrieved landowner in California may proceed via inverse condemnation for damages from a municipality:

> The *Agins* decision appears to leave undisturbed, and therefore still viable, the line of inverse condemnation cases descending from *Klopping v. City of Whittier,* 8 Cal. 3d 39, 104 Cal. Rpt. 1, 500 P. 2d 1345 (1972) involving ine-

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4. The body of state law contrary to the position taken by the City of Lafayette is substantial: *T & M Holmes v. Township of Mansfield,* 162 N.J. Super. 497, 393A. 2d 613 (1978) ("inverse condemnation is established in the jurisprudence"); *American Dredging Company v. State, Department of Environmental Protection of New Jersey,* 161 N.J. Super. 504, 391A. 2d 1265 (1978) at pp. 266, 1267; *London v. City of Seattle,* 93 Wash. 2d 657, 611P. 2d 781 (1980); see, e.g. *Krahl v. Nine Mile Creek Watershed District,* 283 N.W. 2d 530 (Minn. 1979); at p. 534 and *Mattoon v. City of Norman,* 617P. 2d 1347 (Okl. 1980), at p. 1349, 1351; *Minch v. City of Fargo,* supra, at Page 790.

> quitable "pre-condemnation activities" as distinct from overly restrictive land use controls. *1981 Zoning and Planning Law*, ed. by Fredrick A. Strom (Chapter 1.02).

Finally, the *Agins* approach of invalidation as the exclusive remedy has been soundly criticized since its inception:

> One commentator has characterized the result in *Agins* as "shocking", noting that "those few land use cases that can prove an outrageous factual situation now have nowhere to turn in the California system...No federal court, be it District, Appellate, Claims or Supreme-has ever taken the position assumed by California's high court. A plaintiff who alleges a taking now will simply file his case in Federal Court, thereby trusting the community's land use system to a national arena. Bauman, "Agins: Pulling Shut The Courthouse Door," 32 *Land Use Law and Zoning Digest* No. 3, at p. 3 (A.P.A. March, 1980).[5]

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5. The concept of municipal financial responsibility in the context of the *Owen* case and it's effect on compensatory taking actions has also been the subject of much discussion: "the *Owen* decision will not inhibit 99.9% of the policies of municipal government, which has learned to live with all kinds of legal exposure under Title VII of the Civil Rights Act of 1964 and the Revenue Sharing Act. It may, and should, inhibit thoughtless actions often responding to organized pressure tactics-that most city lawmakers and officials know are questionable but are content to "leave to the Courts," *knowing that the ultimate decision will be relatively cost-free even if it is undesirable.* (emphasis

C. There Was Not, Is Not, And Cannot Be An Immunity From Damages Under 42 USC 1983 For Municipalities Enacting And Enforcing Ordinances Which Violate Constitutional Rights.

The City of Lafayette is asking this Court to establish a precedent which will immunize municipalities from the constitutional protections afforded to citizens under the Fifth and Fourteenth Amendments to the United States Constitution. It takes the position that such a grant of immunity would be consistent with the two pronged test as reiterated by this Court in *Owen v. City of Independence*, supra, at p. 638.[6]

In support of that contention, the City of Lafayette has pointed this Court to a number of decisions which supposedly give credence to the contention that an absolute immunity from damages for constitutional violations existed prior to the passage of the Civil Rights Act. However, a close examination of the cases cited by the City clearly indicate that they do not and cannot stand for such an absolute position.

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supplied). Comments, by Herbert M. Franklin, 32 *Land Use Law and Zoning Digest* No. 6, p. 9 (A.P.A., June, 1980). This line of thought is totally consistent with the concerns of Justice Brennan in the *San Diego Gas and Electric* case, supra, at p. 1305, fn. 22. With invalidation as the only remedy, municipalities would have no meaningful reason to heed the advise of a California city attorney to "if all else fails, merely amend the regulation and start over again."

6. "Where the immunity claimed by the defendant was well-established at common law at the time Section 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity."

For example, *Weightman v. The Corporation of Washington*, 66 U.S. (1 Black) 39 (1862) involved a suit for personal injuries in which the plaintiff was thrown from a bridge. The position of the defendant in that case was that a municipality was not responsible for non-feasances or mis-feasances of the persons employed by them. *Weightman*, supra, at p. 49. the Court agreed in that case and couched its decision in terms of the "legislative/discretionary" functions argument. The result of the decision was that municipalities would not be vicariously liable for torts of the persons employed by them, a position which still exist today. *Monell v. New York City Department of Social Services*, 436 U.S. 65, 98 S.Ct. 2018, __ L.Ed. 2d __ (1978). Municipalities are not responsible under the theory of respondeat superior for the simple torts of those they employ.

So, too, goes the rationale of the Court in *Ogg v. the City of Lansing*, 35 Iowa 495 (1872), in which that Court found that "in discharging these legislative functions, the City acts as a quasi-sovereignty, and is not responsible for a neglect or non-feasance of its officers or agents." *Ogg*, supra, at p. 499. As such, the defendant was not responsible for plaintiff's contracting small pox while passing the home of the man with the disease under the charge of City personnel.

Similarly, in *Fowle v. Common Council of Alexandria*, 28 U.S. (3 Pet.) 398 (1830), the plaintiff sued because the City of Alexandria licensed auctioneers and required a bond, and one auctioneer got a license without it, with a subsequent loss to the plaintiff due to the lack of the bond. Again, in a factual situation in which a person who was not directly subject to any regulation sustained a loss, the Court noted that a simple failure to observe a

law of its own, would not sustain an action against the City.[7]

The early cases cited by the City in its Petition for Writ of Certiorari are strewn with the "governmental/proprietary" and "discretionary or legislative/ministerial" rationale for excusing municipalities from damages. However, in the constitutional context, such a rationale cannot be the basis of an absolute immunity from suit. This Court has already clearly found such to be the case:

> To be sure, there were two doctrines that afforded municipal corporations some measure of protection from tort liability. The first sought to distinguish between a municipality's "governmental" and "proprietary" function; as to the former, the City was held immune,

7. Each of the cases cited by the City in its petition at footnotes 14 and 18 fail under such scrutiny: *Kelly v. City of Milwaukee*, 18 Wisc. 83 (1864) - a plaintiff sought damages for failure to abate a nuisance, namely, a hog running wild in the street; *Griffin v. Mayor and Council of New York*, 9 N.Y. 456 (Ct. App. 1853) - suit for personal injuries alleging failure of the City to prevent citizens from obstructing the streets - the Court noted the City would be liable for damages resulting from an unrepaired street; *Smoot v. Mayor, etc., of Wetumpeka*, 24 Ala. 112 (1854) - suit by plaintiff for personal injuries for failing to maintain a bridge; *Brinkmeyer v. City of Evansville*, 29 Ind. 187 (1867) - suit for damages by a plaintiff whose buildings were destroyed by a fire and the failure of the City to provide an adequate fire department; *Dewey v. City of Detroit*, 15 Mich. 307 (1867) - Suit for personal injuries resulting from a defective side-walk; *Wheeler v. City of Cinncinati*, 19 Ohio St. (1869) - City not responsible to victims of a fire for failure to provide necessary agencies for putting out fires (found City not responsible for neglect and non-feasances of it's officers); *Western College of Homeopathic Medicine v. City of Cleveland*, 12 Ohio St. 375 (1861) - City not responsible for damages caused by rioters; *City of Oklahoma v. Hill*, 6 Okla. 114, 50 P 242 (1897) - Plaintiff sued for forceable entry by officers of the City onto plaintiffs' property. Court characterized the action as a suit for trespass and held the City for damages.

> whereas in it's exercise of the latter, the City was held to the same standard of liability as any private corporation. The second doctrine immunized a municipality for its "discretionary" or "legislative" activities, but not for those which were "ministerial" in nature. A brief examination of the application and the rationale underlying each of these doctrines demonstrates that Congress could not have intended them to limit a municipality's liability under 1983. *Owen*, supra, at p. 412.

The position taken by the City would also do violence to the express language contained in *Monell*, supra:

> Local governing bodies, therefore, can be sued directly under 1983 for *monetary*, declaratory or injunctive relief where. as here, *the action that is alleged to be unconstitutional implements or executes* a policy statement *ordinance*, regulation or decision *officially adopted* or by the body's officers. *Monell*, supra, at p. 2035.

Finally, Justice Brennan in the *Owen* case painstakingly set forth the Court's rationale with regard to immunity for constitutional violations:

> Once again, an understanding of the rationale underlying the common law immunity for "discretionary" functions explains why that doctrine cannot serve as the foundation for a good faith immunity under Section 1983. That common law doctrine merely prevented Courts from substituting their own judgment on mat-

> ters within the lawful discretion of municipality. But a municipality has no "discretion" to violate the Federal Constitution; its dictates are absolute and imperative and when a Court passes judgment on the municipality's conduct in a Section 1983 action, it does not seek to second guess the "reasonableness" of the City's decision nor to interfere with the local governments resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and Statutes. *Owen,* supra, at p. 1413.

The availability of such an immunity must be examined in light of the historical background of the Civil Rights Act. Section 1983 and its jurisdictional counterpart, 28 USC 1343 (3), were first enacted as part of the Ku Klux Klan Act of 1871 in order to enforce the provisions of the Fourteenth Amendment. The text of the present 1983 emerged as a separate section when Congress codified the existing law in 1874, and was implemented to protect rights secured by Federal laws as well as rights, privileges and immunities guaranteed by the Constitution. See, M. M. Fahrenbach, "Note: The Municipal Zoning Power and Section 1983 Liability After *Owen v. City of Independence*", *Loyola University Law Journal,* No. 12, at p. 29 (Fall 1981). However, as early as 1872 this Court opined that the fundamental rights secured by the first eight amendments to the Constitution only provided protection against Federal transgression. See, *Slaughterhouse Cases,* 83 U.S. (16 Wall.) 36 (1872). Of course, the protection of the Fifth Amendment has long since been found to be available to citizens and applicable to the states. See, *Chicago B&Q Railroad v. City of Chicago,* 166 U.S. 266, 17 S.Ct. 581, 41 L.Ed.

979 (1897). That there could be no common law immunity from violations of Federal Constitutional rights prior to this time follows by definition.

Further, the legislative history of the Civil Rights Act was given close scrutiny in *Monell*, supra. In the context of uncompensated takings, *Monell* cited the comments of representative Bingham, author of Section 1 of the Fourteenth Amendment:

> Representative Bingham, for example, in discussing Section 1 of the Bill, explained that he had drafted Section 1 of the Fourteenth Amendment with a case of *Barron v. Mayor of Baltimore*, 7 Pet. 243, 8 L.Ed. 672 (1833), especially in mind. "In that case the City had taken private property for public use without compensation . . ., and there was not redress for the wrong . . ." *Globe*, App. 84 (emphasis added).
>
> Bingham's further remarks clearly indicate his view that *such takings by cities* as had occurred in *Barron, would be redressable under Section 1 of the Bill.* See, *Globe*, App. 85. More generally, and as Bingham's remarks confirm, Section 1 of the Bill would logically be the vehicle by which Congress provided redress for takings, since that Section provided the only civil remedy for Fourteenth Amendment violations and that amendment unequivocally prohibited uncompensated takings. Given this purpose, it beggars reason to suppose that Congress would have exempted municipalities from suit, insisting instead that compensation for a taking come from an officer in his individual capacity

> rather than from the governmental unit that had the benefit of the property taken. (emphasis supplied) *Monell*, supra, at p. 2034.

Section 1983 does not provide for municipal liability in the event of a simple tort. The language of Section 1983, read against the background of the same legislative history, compels the conclusion the Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. *Monell*, supra, at p. 2036. *Monell* is therefore consistent with the pre-Civil Rights Act cases which refused to impose liability for simple tort based on the concept of respondeat superior.

Petitioners protracted reliance on the case of *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980) is misplaced. In that case, this Court found that the members of the Virginia Supreme Court and the body which those members comprised were immune from suit when acting in a legislative capacity. Although Respondent disagrees with the extention of such an immunity to individual legislators, assuming that to be true, the holding of that case in no way dictates absolute immunity for municipalities in the light of *Monell*, supra, and *Owen*, supra. Had Respondent brought an action for damages against the City Council of Lafayette, it would appear that the logic of the *Supreme Court of Virginia* case could extend immunity to the City Council of Lafayette and its members. However, to say that the Supreme Court of Virginia and the City of Lafayette, Louisiana deserve the same immunity makes a quantitative jump which cannot be sanctioned in light of this Court's previous opinions on the responsibility of municipal corporations.

That simple immunity from tort must be distinguished from immunity for claims of constitutional violations has not gone unnoticed in the jurisprudence. See, *Minch v. City of Fargo*, supra, at p. 789; *DeLuca v. Kahr Brothers, Inc.* 171 N.J. Super. 100, 407 A. 2d 1285 (1979) ("if suit is predicated upon the Civil Rights Act, 42 USCA 1983, as counsel asserts it will be, the liability may turn on whether the action complained of is judicial, legislative, or executive. If legislative, the only liability is that of the township, and it is then liable only on proof of an unlawful policy or custom," at p. 1289); *T&M Homes, Inc. v. Township of Mansfield*, 162 N.J. Super. 497, 383A. 2d 613 (1978) ("providing absolute immunity would deny all the arguments in favor of the injured citizen, and is no longer permitted under *Monell*" at p. 624; *City of Austin v. Teague*, 556 S.W. 2d 400, 404 (1977), rev. on other grounds, 570 S.W. 2d 389 (1978); see, *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir., 1980), at p. 613; *Bruce v. Riddle*, 464 F.Supp. 745 (D.C. S.C. 1979) FRCP 54 (b) Judgment granting absolute immunity to individual legislators affirmed at 631 F.2d 272 (4th Cir. 1980).[8]

Petitioners reliance on *City of Newport, et al v. Fact Concerts, Inc.* __ US __, 49 USLW 4860 (June 26, 1981), misses the mark. In considering the *Fact Concerts* case, this Court noted that:

---

8. "Read literally, the Court has stripped municipalities of any immunity for legislative acts that may later be held invalid. Smith, "Comment: *Owen v. City of Independence*," 32 *Land Use Law and Zoning Digest* No. 6, p. 7 (APA, 1980).

> In *Owen v. City of Independence*, the Court held that neither history nor policy supported a construction of Section 1983 that would allow a municipality to assert the good faith of its officers or agents as a defense to liability for damages. (Citations omitted). *Owen*, however, concerned only compensatory damages, and petitioner contends that *with respect to a municipality's liability for punitive damages, an examination of the common law background and policy considerations yields a very different result. City of Newport*, supra, at p. 4863.

Additionally, in addressing the policy aspect of punitive damages, the Court noted that there was no question of the equitable distribution of the losses resulting from official misconduct, one of the cornerstones of the *Owen* decision. *City of Newport*, at p. 4865. Finally, that *City of Newport* is no argument against extending any absolute immunity to municipalities is made clear by the court's specific dictate:

> And if additional protection is needed, *the compensatory damages that are available against a municipality* may themselves induce the public to vote the wrong doers out of office. *City of Newport*, supra, at p. 4865.

It is *imperative* to note here that the plaintiff's action in *City of Newport* under 42 USC Section 1983 was premised on *a vote of the city council* to cancel a license of the petitioner. *City of Newport*, supra, at p. 4860.

D. Policy Demands, Rather Than Prohibits, Accountability Of Municipalities For Violation Of Constitutional Rights.

Petitioner's Writ is fraught with the same type of policy arguments which were raised and dismissed by this Court in the *Owen* decision, supra. As set forth in *Owen*, a damage remedy against the municipality, as opposed to the individual legislator, will not "paralyze" local government. Any inhibiting effect is significantly reduced, if not eliminated, when the threat of personal liability is removed. *Owen*, supra, at p. 32. The City apparently argues to this Court that there should be no liability because it will lead decision makers to avoid the infringement of constitutional rights. Of course, this is one of the statutes raisons d'etre. *Owen*, supra, at p. 1418. As noted above, the alternative is to impose any staggering liabilities on individual landowners. See, *Hagman*, supra, at p. 133. As dictated in *Owen*, even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable cost of government borne by all tax payers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated. *Owen*, supra, at p. 1417.

To shield municipalities from violations of constitutional rights will inevitably lead to a continuation of the philosophy which so concerned Justice Brennan in the *San Diego* case, supra. With invalidity as the only remedy to unconstitutional legislation, there is no motivating factor to prevent continual violation of constitutional rights of individuals through the passage of successive ordinances. Few landowners possess the ability to spar with a municipality in the courts on a continual basis:

> . . . damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrong doer is the institution that has been established to protect the very rights it had transgressed . . .
>
> Moreover, Section 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well. *Owen*, supra, at p. 1415-1416.

CONCLUSION

The availability of the full protection of the Fifth and Fourteenth Amendments to the Constitution of the United States is imperative and of great moment to the citizens of this country. As is noted above, the availability of that protection has been clearly recognized in the jurisprudence. See also, *Sixth Camdem Corporation v. Evesham T.P., Burlington City*, 420 F.Supp. 709 (D.C. N.J., 1976). Petitioner asks this Court to declare that the Fifth Amendment is not addressed to municipalities by arguing that the Court in *Pennsylvania Coal, Monell,* and *Owen* really did not mean what it said. The City of Lafayette has urged this Court to allow that decisions of local governments can be made "in a legal climate of certainty and fairness." (See, Petition For Writ of Certiorari, p. 27). An examination of the record in this case and of the evidence as set forth in Mr. Hernandez's Jurisdictional Statement to this Court in a related case

will graphically detail the "fairness" which the City of Lafayette seeks to protect. (See, Jurisdictional Statement of James Hernandez, Docket No. 81-600, at pp. 5-14). The City wishes the indiscriminate right to take property without compensation and to utilize the police power to hold down property values in anticipation of future expropriations. They seek to accomplish this by calling such attempts "legislation."

Many Courts have circumvented this fiction by recognizing the dubiousness of characterizing dealings with individual landowners as "legislation." See, *Fasano v. Board of County Commissioners*, 264 Or. 574, 507 P. 2d 23 (1973). One of petitioners counsel, Richard F. Babcock, has likewise candidly criticized the fiction:

> The freedom from accountability of the municipal governing body may be tolerable in those cases where the legislature is engaged in legislating but it makes no sense where the legislature is dispensing or refusing to dispense special grants. Richard F. Babcock, "The Zoning Game", at p. 158, (1977).

We respectfully submit that the time has come for municipalities to learn that this Court meant what it said in *Pennsylvania Coal, Monell* and *Owen*. We ask that this Honorable Court do so by denying the City of Lafayette's Petition For Writ of Certiorari, or alternatively, by affirming the Judgment of the Fifth Circuit Court of Appeal.

Respectfully submitted:

ONEBANE, DONOHOE,
BERNARD, TORIAN,
DIAZ, McNAMARA & ABELL

By:_____

JOHN G. TORIAN, II
P. O. DRAWER 3507
LAFAYETTE, LA. 70502

By:_____

MICHAEL G. DURAND
P. O. DRAWER 3507
LAFAYETTE, LA. 70502

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing has been mailed to each attorney of record on this 16th day of December, 1981.

_____

JOHN G. TORIAN, II

Petitioner's Reply Brief

FILED
JAN 7 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CITY OF LAFAYETTE,

Petitioner,

v.

JAMES E. HERNANDEZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

CHARLES L. SIEMON
WENDY U. LARSEN
ROSS, HARDIES, O'KEEFE, BABCOCK
& PARSONS
One IBM Plaza, Suite 3100
Chicago, Illinois 60611
(312) 467-9300
Counsel for Petitioner

Of Counsel
RICHARD F. BABCOCK
SUSAN LICHTENFELD
BARBARA ROSS

January, 1982

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	4
APPENDIX	

TABLE OF AUTHORITIES

Cases

	PAGE
Bruce v. *Riddle*, C/A No. 78-1966-3 (D. S. C. Nov. 24, 1981)	3
Four States Realty Co., Inc. v. *City of Baton Rouge*, 309 So. 2d 659 (La. 1975)	4
Hernandez v. *City of Lafayette*, 643 F. 2d 1188, *rehearing denied*, 649 F. 2d 336 (5th Cir. 1981)	1

Statutes

42 U. S. C. § 1983	1, 4

Other Authorities

R. Stern and E. Gressman, SUPREME COURT PRACTICE (5th ed. 1978)	2

IN THE

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v.

JAMES E. HERNANDEZ,

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

The Petition for Writ of Certiorari of the City of Lafayette, Louisiana seeks review of a decision of the Fifth Circuit Court of Appeals holding that:

1.) A regulation which "goes too far" and deprives a landowner of all beneficial use of his property requires payment of just compensation; and

2.) Money damages are available under 42 U.S.C. § 1983 in actions challenging the constitutional validity of local government legislative decisions. *Hernandez* v. *City of Lafayette*, 643 F. 2d 1188, *rehearing denied*, 649 F. 2d 336 (5th Cir. 1981).

The Petitioner submits to this honorable Court that the questions presented are of significance far beyond the facts of this case and that review by this Court is of immediate importance to local governments throughout the nation.

The function of this Court's certiorari jurisdiction was adroitly described in a speech by Chief Justice Vinson to the American Bar Association in 1949:

> The function of the Supreme Court is, therefore, to *resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution,* laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only *those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.* Those of you whose petitions for certiorari are granted by the Supreme Court will know, therefore, that you are, in a sense, prosecuting or defending class actions; that you represent not only your clients, but *tremendously important principles, upon which are based the plans, hopes and aspirations of a great many people throughout the country.*

69 S. Ct. v, vi (emphasis added), *quoted* in Stern and Gressman, SUPREME COURT PRACTICE 258-9 (5th ed. 1978).

Supreme Court Rule 17 delineates grounds for granting petitions for writs of certiorari, grounds that are designed to ensure that only those cases involving federal questions of wide import will be taken for review. The Petition for Writ of Certiorari sets out in detail, under these jurisdictional criteria, why the Petition should be granted, including the conflicting and confused character of contemporary "taking" jurisprudence, and outlines the significance of the questions presented to local governments and their citizens.

Respondent's brief, however, ignores the jurisdictional criteria for granting petitions for writs of certiorari and focuses on the merits of the questions presented in the Petition, which

according to Respondent's Brief are "imperative and of great moment to the citizens of this country." (Respondent's Brief in Opposition at 23). In so doing Respondent underscores, rather than undermines, the pressing need for this Court to clarify and stabilize this area of the law.[1]

Respondent further highlights the need for this Court to review this case when he points to series of lower court opinions that he construes to support the Fifth Circuit's opinion, illustrating the significant conflict that exists between the opinions of the various lower courts cited by Petitioners and Respondents. This conflict and confusion is one of the principal reasons why this Court should grant the Petition. The extent of this conflict is dramatically illustrated by a recent opinion of United States District Court for the State of South Carolina wherein the Court held:

> that municipalities and other local governmental units are entitled to absolute immunity from damages for their legislative enactments. To hold otherwise would not be consonant with the policies or purposes of § 1983 and would do no more than to subject local legislation to constant Federal review at the caprice of those alleged to have been wronged thereby.

Bruce v. *Riddle*, C/A No. 78-1966-3 at 9 (D.S.C. Nov. 24, 1981). The opinion of the district court, which is set out in its entirety in the Appendix, is irreconcilably in conflict with the Fifth Circuit's opinion sought to be reviewed herein and is indicative of the confusion and conflict that prevails in this area of the law in the lower courts throughout the Country.[2]

---

[1] It should be noted that Respondent apparently agrees that it would be appropriate for this Court to grant the Petition, in that he prays, in the alternative, that this Court affirm the Fifth Circuit's judgment, an action that would require that the Petition be granted. (Respondent's Brief in Opposition at 24).

[2] Notwithstanding the implication of Respondent's Brief, the questions presented in the Petition herein involve the remedies

(footnote continued on following page)

CONCLUSION

Petitioner respectfully submits that the questions presented for review are federal questions of wide import that involve great conflict and inconsistency in the lower courts and that it is imperative that this Court grant the Petition for Writ of Certiorari in order to clarify and stabilize the fundamental principles of law that are involved.

Respectfully submitted,

CHARLES L. SIEMON
WENDY U. LARSEN
ROSS, HARDIES, O'KEEFE, BABCOCK & PARSONS
One IBM Plaza, Suite 3100
Chicago, Illinois 60611
(312) 467-9300
Counsel for Petitioner

Of Counsel
RICHARD F. BABCOCK
SUSAN LICHTENFELD
BARBARA ROSS

January, 1982

(footnote continued from previous page)

available in actions challenging *legislative* acts brought under 42 U.S.C. § 1983. Zoning, in Louisiana, is a legislative power and zoning decisions are unequivocally legislative acts, *Four States Realty Co., Inc. v. City of Baton Rouge*, 309 So.2d 659 (La. 1975). Moreover, under the allegations of the Complaint, taken as true for purposes of the Petition, the City's failure to legislate in the manner preferred by Respondent was not a grant or denial of a "special grant," but a reaffirmation of the original comprehensive zoning applied to Respondent's property, an unmistakably "legislative" act.

APPENDIX

Filed November 24, 1981
John W. Williams, Clerk

IN THE UNITED STATES DISTRICT COURT
for the District of South Carolina
Greenville Division

Tom S. Bruce,
Plaintiff,

vs.

C. Daniel Riddle, I. H. Gibson, Mike Fair, Melvin Pace, John L. Bauer, W. Bentley Hines, Johnnie M. Smith, W. Shannon Linning, Larry M. McCalla, Marshall L. Cason, J. Harlon Riggins, W. B. Bennett, Charles F. Styles, and Clyde E. Morgan, as members of the Greenville County Council and Greenville County,
Defendants.

ORDER
C/A No. 78-1966-3

and

Buxton Development Corp.,
Plaintiff,

vs.

C. Daniel Riddle, I. H. Gibson, Mike Fair, Melvin Pace, John L. Bauer, W. Bentley Hines, Johnnie M. Smith, W. Shannon Linning, Larry M. McCalla, Marshall L. Cason, J. Harlon Riggins, W. B. Bennett, Charles F. Styles, and Clyde E. Morgan, as members of Greenville County Council and Greenville County,
Defendants.

ORDER
C/A No. 81-903-3

PROCEDURAL BACKGROUND

These § 1983 actions were originated by the Plaintiff, Tom S. Bruce, against Greenville County and the members of

Greenville County Council alleging that the Council's enactment of an ordinance rezoning certain of his property from multi-family to single-family use violated rights secured to him under the Fifth and Fourteenth Amendments to the United States Constitution. *U. S. Const.* amend. 5, 14. Jurisdiction is premised upon 28 *U.S.C.* §§ 1343(3) and 1331.

By Order dated February 1, 1979, The Honorable Robert W. Hemphill granted the petition of certain property owners to intervene as parties defendant. Immediately thereafter, Judge Hemphill granted the motion of the members of Greenville County Council to dismiss as to them, which Order was affirmed on appeal. *Bruce v. Riddle*, 613 F.2d 272 (4th Cir. 1980).

Upon discovery that certain of the rezoned property belonged to a corporation, Buxton Development Corporation, Inc., of which Bruce is the sole stockholder, an identical Complaint was filed on its behalf. The two actions were consolidated by this Court by Order dated June 15, 1981.

By Order dated August 3, 1981, this Court granted summary judgment for the Defendant as to Plaintiffs' claims for punitive damages. The Court subsequently permitted the Defendant-Intervenors to withdraw their intervention.

These actions are presently before the Court on Motion of the remaining Defendant, Greenville County, to Dismiss or, alternatively, for Summary Judgment. Based upon the pleadings, affidavits, depositions and other materials on file, as well as the memoranda and arguments of counsel and applicable law, the Court concludes as follows:

SUMMARY JUDGMENT

I. *Allegations.*

The factual allegations of the Complaints may be summarized as follows: that Plaintiffs are the owners of certain property located in the County of Greenville which, prior to the

rezoning in issue, was zoned multi-family residential and, as such, had a fair market value of Fifteen Thousand and No/100 ($15,000.00) Dollars per acre; that in or around March, 1978, and continuing thereafter, certain members of Greenville County Council were contacted by and met with certain residents of the surrounding area to discuss plans for rezoning Plaintiffs' property single-family residential; that in March, 1978, these members of Greenville County Council undertook to reevaluate the zoning of Plaintiffs' and certain surrounding property, commissioning a zoning study and requesting their planning staff to report relative to the zoning; that, despite a staff recommendation that the property not be rezoned, Council enacted an ordinance rezoning Plaintiffs' property single-family residential; and that, as a direct result of the rezoning, the value of Plaintiffs' property decreased to below Two Thousand and No/100 ($2,000.00) Dollars per acre.[1]

From these allegations, Plaintiffs conclude that Defendants, acting in concert with private individuals under color but in direct violation of State law, deprived them of their rights to just compensation, equal protection and due process. Plaintiffs allege injury in the amount of Two Hundred Seventy-five Thousand and No/100 ($275,000.00) Dollars plus other incidental and consequential damages.

II. *Citizens' Activities.*

Up until the most recent hearing in these matters, the gravamen of Plaintiffs' complaint appeared to be that the rezoning in issue was the result of "*ex parte* communications on the merits by [Council] members with property owners in the

[1] Upon deposition, Bruce testified to an "after value" of Two Thousand and No/100 ($2,000.00) Dollars. See Bruce deposition, p. 172. Plaintiffs' expert witness, Harvey E. Rosen, placed the value at Three Thousand and No/100 ($3,000.00) Dollars. See Plaintiff's Supplemental Answers to Defendant's Interrogatories, dated October 7, 1981.

area."[2] Plaintiffs, however, have failed to present any evidence, by affidavit or otherwise, supporting these allegations. Accordingly, this issue may be disposed of by summary judgment. *See Fed. R. Civ. P.* 56(e).

Assuming, *arguendo,* that Plaintiffs' allegations had been substantiated, this issue would nonetheless be irrelevant to the claims asserted against the County. The validity of a zoning ordinance does not depend upon the identity or the aims of its advocates; rather, "[t]he only question which federal district courts may consider is whether the action of the [Council] is arbitrary and capricious, having no substantial relation to the general welfare." *South Gwinnett Venture v. Pruitt,* 491 F.2d 5, 7 (5th Cir. *en banc*), *cert. denied* 419 U.S. 837 (1974).

The Greenville County Council is a legislative body, and, as such, its members have a duty to consult with their constituents regarding pending or prospective legislation. "Meeting with 'interest' groups, professional or amateur, regardless of their motivation, is a part and parcel of the modern legislative [process] . . ." *Bruce v. Riddle, supra,* at 280. In the absence of evidence of fraud or corruption, neither the motives of the surrounding residents in advocating nor of the Council in enacting the rezoning ordinance are germane to the issues presently before the Court. *See, e.g.,* 56 AmJur2d, *Municipal Corporations* §§ 393, 394, pp. 436-439 (1971). There being no such evidence, any further inquiry would be unwarranted.

In light of the above considerations, the Court concludes that there is no genuine issue as to any material fact relating to Plaintiffs' allegations of conspiracy or corrupt motive, and summary judgment is hereby granted as to these issues.

---

[2] Plaintiff's Memorandum in Opposition to Defendant's Motion for Judgment on the Pleadings, dated January 23, 1979. See also Complaint ¶¶ 6, 14, 15, 16, 22, 23, 26, and 27.

III. ***Ordinance's Validity.***

The thrust of Plaintiffs' argument in opposition to Defendant's Motion for Summary Judgment is that there remain disputed factual issues affecting the validity of the rezoning ordinance. In light of the evidence presented and the applicable law, however, the Court concludes that the ordinance must be sustained.

Federal district courts do not sit as "super zoning boards," substituting their judgment for those of the appropriate local bodies. *Steel Hill Development, Inc. v. Town of Sanborton,* 469 F.2d 956, 960 (1st Cir. 1972). Rather, these bodies' actions are entitled to a presumption of validity, and, absent evidence of purposeful discrimination or procedural defect, the scope of Federal review is limited to the question of whether the challenged action was clearly arbitrary and capricious, having no substantial relation to the general welfare. *South Gwinnett Venture v. Pruitt, supra. See also Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974); *Euclid v. Amber Realty Co.,* 272 U.S. 365 (1926); *Stansberry v. Holmes,* 613 F.2d 1285, 1289 (5th Cir.), *cert. denied* 449 U.S. 886 (1980); *Roberts v. City of Woonsocket,* 575 F.2d 339, 341 (1st Cir. 1978). The burden is upon the party challenging the ordinance, and, if its validity "be fairly debatable, the legislative judgment must be allowed to control." *Euclid v. Amber Realty Co., supra,* at 388.

Plaintiffs have presented no evidence of purposeful discrimination or procedural defect in the ordinance's enactment,[3] relying exclusively on the fact that the zoning was changed despite the contrary recommendation of the planning staff.[4] This fact, considered in light of the other evidence presented

---

[3] Throughout the proceedings, Plaintiffs have argued that the rezoning resulted from opposition to a proposed HUD project. The record is devoid of any evidence supporting this argument, however, and the developer of the proposed project testified on deposition that he was aware of no "spill-over" effect. Scott deposition, p. 21.

[4] It should be noted that the staff report recognized single-family zoning as consistent with the County's comprehensive plan.

and the pertinent case law, fails to give rise to a substantial issue of material fact affecting the ordinance's validity.

The situation presented is not one of "a single-family zoned island in a sea of [multi-family] zoning." *Shenk v. Zoning Comm'n*, 440 F.2d 295, 297 (D.C. Cir. 1971). Rather, Plaintiffs' property was part of a larger tract rezoned to conform with the surrounding land use. Two of the Councilmen testified on deposition to their belief that this tract had originally been improperly zoned,[5] and that the rezoning was motivated by concern among the Council members over population density and congestion.[6] These are the concerns traditionally recognized as justifying the enactment and/or amendment of zoning ordinances. Accordingly, even if the Council's rejection of the planning staff's recommendation be perceived as evidence of arbitrariness or capriciousness—a proposition to which this Court cannot subscribe—the balance of the record clearly establishes their action as consistent with reasonableness. Summary judgment should, therefore, be granted as to this issue. *Cf. Roberts v. City of Woonsocket, supra* (upholding judgment for city despite conflict between rezoning and master plan).

IV. *Taking Claim.*

Plaintiffs also allege that the value of their property was diminished as a result of the rezoning and that this diminution in value constituted a taking without just compensation in violation of the Fifth and Fourteenth Amendments. The following quotation from *Kent Island Joint Venture v. Smith*, 452 F.Supp. 455, 460-461 (D.Md. 1978), effectively answers this claim:

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[5] The staff recommendation was based in large part upon a finding that there had been "no major unanticipated economic, physical or social change in the area." However, the general ordinance in effect at the time of the rezoning, *Greenville County Zoning Ordinance* art. 10, § 10:3.4, recognized the impropriety of the original zoning classification as a co-equal criterion for amendment.

[6] See Pace and Linning depositions.

Although governmental interference by regulation of the use of private property can constitute a *de facto* or constructive taking, there is no taking in the constitutional sense unless the interference is so substantial as to render the property worthless or useless. *Steel Hill Development, Inc. v. Town of Sanbornton,* 469 F.2d 956, 963 (1st Cir. 1972); *Smoke Rise, Inc. v. Washington Suburban San. Com'n,* 400 F.Supp. 1369, 1382 (D.Md. 1975). It is not enough that the regulation deprives the property owner of the most profitable use of the property, *United States v. Central Eureka Mining Co.,* 357 U.S. 155, 168, 78 S.Ct. 1097, 2 L.Ed.2d 1228 (1958), or that the regulation causes a severe decline in the property's value. *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962). . . . . Before a court can conclude that there has been an unconstitutional taking of property, the government regulation must deprive the landowner of all reasonable uses of his land. *C.F. Lytle Co. v. Clark,* 491 F.2d 834, 838 (10th Cir. 1974); *see Donahoe Const. Co. v. Maryland National C.P. & P. Com'n,* 567 F.2d 603, 608 n. 13 (4th Cir. 1977).

. . .

The effect on plaintiff of the governmental action here is little different from that of any zoning or land use decision made by local authorities. Plaintiff would like to maximize the profits it might expect to make by developing the land in a certain desired manner. Local zoning and land use decisions made by various County officials have restricted the development and have undoubtedly affected adversely the value of the property. But every zoning decision made by a local government official has an effect on the value of the land involved. If a disappointed developer of land could show an unconstitutional taking of his property every time he lost a zoning case, then every zoning decision made by a local government official could be brought into federal court for review. Certainly, . . . the Fifth Amendment [does not contemplate] that a federal court should have the final say in every zoning or land use matter.

Accordingly, the Court concludes that summary judgment should be granted as to this claim as well.

V. *Immunity.*

As an alternative to its Motion for Summary Judgment, Defendant contends it is entitled to an absolute legislative immunity. The Court agrees.

Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658 (1978), concluded local governments were "persons" for purposes of 42 *U.S.C.* § 1983. The scope of any municipal immunity was left open, however. *See* 436 U.S., at 701.

Owen v. City of Independence, 445 U.S. 622 (1980), addressed this issue, stating at the outset:

> "[N]otwithstanding §1983's expansive language and the absence of any express incorporation of common-law immunities, we have, on several occasions, found that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that "Congress would have specifically so provided had it wished to abolish the doctrine" . . .
>
> . . .
>
> Where the immunity claimed by the defendant was well established at common law at the time § 1983 was enacted, and where its rationale was compatable with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity.

The Court then proceeded to analyze the immunity before it—a qualified immunity based upon the good faith of its officers or agents—concluding that its existence was supported by neither history nor public policy. *See* 445 U.S., at 638-656.

Although this decision has been interpreted as imposing "strict liability on municipalities for constitutional violations," 445 U.S., at 658 (Justice Powell dissenting),[7] a more accurate interpretation appears to be that it "decided *only* the question whether municipalities and local government units were entitled to the defense of qualified immunity for the good faith

[7] *See also Maine v. Thiboutot*, 448 U.S. 1, 22 n. 10 (Justice Powell dissenting); Comment, 55 *St. John's L. Rev.* 153 (1980).

actions of their officers." *Morrow v. Sudler*, 502 F.Supp. 1200, 1205 (D.Colo. 1980) (emphasis added). The precise question presented—whether a municipality or other local governmental unit is immune from suit under § 1983 for the legislative enactments of its elected representatives—has not been authoritatively decided, but may be answered "[o]nly after careful inquiry into considerations of both history and policy." *City of Newport v. Fact Concerts, Inc.*, 49 U.S. L.S. 4860, 4862 (June 26, 1981).

The immunity of municipalities for legislative acts was well established by the time Congress enacted the Civil Rights Act of 1871,[8] and the immunity of State legislatures and other State bodies acting in a legislative capacity from suit arising out of their legislative acts has since been reaffirmed in the context of § 1983. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980); *Tenney v. Brandhove*, 341 U.S. 367 (1951). Plaintiffs have directed the Court to no point in the debates over the enactment of the Civil Rights Act in which Congress specifically considered abolishing the common law immunity for legislative acts, and, in the absence of such evidence, this Court will not assume it intended to do so.

Moreover, substantial policy considerations support the extension to municipalities and other local governmental units of an absolute immunity for acts undertaken in a purely legislative capacity. As stated by Justice Frankfurter in *Tenney v. Brandhove, supra*, at 377:

> Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.

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[8] *See, e.g., Weightman v. Washington*, 66 U.S. (1 Black) 39, 49-50 (1862); *Larkin v. County of Saginaw*, 11 Mich. 88 (1862).

Accordingly, the Court concludes that municipalities and other local governmental units are entitled to absolute immunity from damages for their legislative enactments. To hold otherwise would not be consonant with the policies or purposes of § 1983 and would do no more than to subject local legislation to constant Federal review at the caprice of those alleged to have been wronged thereby.

Since the Greenville County Council is a legislative body and the passage of the challenged zoning ordinance a legislative act, the County and Council are entitled to absolute immunity from damages based upon the Plaintiffs' allegation. Summary judgment is, therefore, warranted.

VI. ***Conclusion.***

Although extensive discovery has been undertaken, Plaintiffs have failed to raise a genuine issue as to any material fact. The ordinance is unquestionably valid, and Plaintiffs have failed even to allege a taking of constitutional dimensions. Moreover, the County and Council are immune from suit under § 1983 on the facts alleged.

IT IS, THEREFORE,

ORDERED, that Defendant's Motion for Summary Judgment be and hereby is granted.

IT IS SO ORDERED.

G. Ross Anderson, Jr.

G. ROSS ANDERSON, JR.
UNITED STATES DISTRICT JUDGE

Greenville, South Carolina
November 24th, 1981.

TRUE COPY
TEST:
JOHN W. WILLIAMS, CLERK

By: Mary Wilson

Deputy Clerk